TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 611

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, PETITIONER

vs.

KENNETH G. SMITH AND FOREMAN-STATE TRUST AND SAVINGS BANK, EXECUTORS OF THE WILL OF DOUGLAS SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 7, 1933
CERTIORARI GRANTED FEBRUARY 20, 1933

(37296)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 601

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, PETITIONER

vs.

KENNETH G. SMITH AND FOREMAN-STATE TRUST AND SAVINGS BANK, EXECUTORS OF THE WILL OF DOUGLAS SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable John P. Barnes District Judge of the United States for the Northern District of Illinois, on Twenty-Eighth day of July, in the year of our Lord one thousand nine hundred and Thirty-One, being one of the days of the regular July Term of said Court, begun Monday, the Sixth day of July, and of our Independence the 156th year.

Present:

Honorable John P. Barnes

H. C. W. Laubenheimer, U. S. Marshal.

Charles M. Bates, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

Kenneth G. Smith and Foreman-State Trust and Savings Bank, a banking corporation, Executors of the Will of Douglas Smith, deceased
vs.
Mabel G. Reinecke, formerly Collector of Internal Revenue for the First Collection District of Illionis.
} No. 38956.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Declaration in the above-entitled cause, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 8th day of August, 1930.

3 • • (Caption) • •

DECLARATION.

Now Come Kenneth G. Smith and Foreman-State Trust and Savings Bank, a banking corporation, Executors of the Will of Douglas Smith, Deceased, by their attorneys Hopkins, Starr & Hopkins and Burry, Johnstone, Peters & Dixon and complain of Mabel G. Reinecke, formerly Collector of Internal Revenue of the United States for the First Collection District of Illinois, of a plea of trespass on the case on promises, and for cause of complaint say:

First Count.

1. That plaintiff, Foreman-State Trust and Savings Bank, is a banking corporation and public trust company duly organized and existing under and by virtue of the Laws

of the State of Illinois and having its principal office and place of business at Thirty-three North La Salle Street, Chicago, Illinois; that Foreman-State Trust and Savings Bank and Kenneth G. Smith, plaintiffs herein, are citizens of the United States and residents of the City of Chicago, State of Illinois; that said Foreman-State Trust and Savings Bank and Kennteh G. Smith are the Executors of the last will and testament of Douglas Smith, Deceased, who died testate on November 7, 1927, a resident of the City of Chicago of Cook County in the State of Illinois,
4 and a citizen of the United States; that the last will and testament of Douglas Smith, Deceased, was duly admitted to probate by the Probate Court of said Cook County, Illinois, which then and there had jurisdiction thereof, on, to-wit, the 18th day of November, 1927, and on said date, to-wit, the 18th day of November, 1927, letters testamentary were granted by the said Probate Court of Cook County, Illinois, to the plaintiffs herein; that the plaintiffs bring into Court here the letters testamentary so granted to them by the said Probate Court of Cook County, Illinois, whereby it fuly appears to the Court here that the plaintiffs are the Executors of the said last will and testament of the said Douglas Smith, Deceased, and have the execution thereof;

2. That Mabel G. Reinecke, the defendant herein, was on, to-wit, January 1st, 1925, and prior thereto and from thence continuously up to and including March 31, 1929, Collector of Internal Revenue of the United States for the First Collection District of Illinois, in which are said Chicago and Cook County, and said defendant now is, as she long has been, a resident of the City of Chicago and State of Illinois;

2. That the cause of action herein exhibited by plaintiffs against defendant is one arising under the laws of the United States providing for Internal Revenue;

4. That on or about, to-wit, September 25, 1922, in the City of Chicago and State of Illinois, the said Douglas Smith, a resident of said City, and a citizen of the United States, by four separate indentures on that day and at the place aforesaid duly executed by him as grantor, and by himself and the said Kenneth G. Smith and Foreman Bros. Banking Company, a corporation organized and existing under and by virtue of the Laws of the State of Illinois (now Foreman-State Trust and Savings Bank) as Trustees established four trusts known respectively as the Emaroy Trust, the June

Trust, the Florence Trust and the Kenneth Trust for
5 the benefit, respectively, of his wife, Emaroy J. Smith,
his daughters, June Keith Slater and Florence Gifford Ellis, and his son, Kenneth G. Smith, hereinafter sometimes referred to as the beneficiaries under said trusts, respectively; that thereafter on or about, to-wit, October 30, 1922, in the City of Chicago and State of Illinois, the said Douglas Smith, by an indenture on the day and at the place last aforesaid duly executed by him as grantor, and by himself and the aforesaid Kenneth G. Smith and Foreman Bros. Banking Company, a corporation, as trustees, established a trust known as the General Trust for the benefit of his wife, Emaroy J. Smith, and his two daughters, June Keith Slater and Florence Gifford Ellis, and his son, Kenneth G. Smith; that in and by each of said five trust indeutures, the said Douglas Smith, Kenneth G. Smith and Foreman Bros. Banking Company, were constituted the trustees of the trusts thereby established; that at the time of the establishment of said trusts, respectively, and from thence continuously to and including October 22, 1924, Foreman Bros. Banking Company (later during said period known as The Foreman Trust & Savings Bank, now Foreman-State Trust and Savings Bank) was an Illinois corporation duly authorized to act as a trustee of said trusts and the said Douglas Smith and Kenneth G. Smith were each of them citizens or Illinois, of full age and lawfully qualified to act as trustees of said trusts;

5. That in and by the said trust indentures establishing the said Emaroy Trust, the June Trust and the Florence Trust, the grantor, Douglas Smith, conveyed and assigned to the trustees thereof, in the case of each trust respectively, in the order named above, fifty (40) shares, thirty (30) shares, and thirty (30) shares of the common capital stock of the Pepsodent Company, an Illinois corporation, and provided that the same was to be held and managed by said trustees and the income therefrom and from all other trust property was to be by them collected and reinvested and
accumulated until said stock and all said accumulations
6 and additions thereto amounted, in the case of each trust
respectively, in the order named, to the sum of $500,000.00, $300,000.00 and $300,000.00 and thereafter said trustees were to pay over the net income of each of said trusts to the respective beneficiaries thereof, that is to say, to the said Emaroy J. Smith, June Keith Slater and Florence Gif-

ford Ellis, respectively, during their respective lives; that in and by each of said trust instruments it was further provided that upon the death of the beneficiary thereof, the trust thereby established should thereupon terminate and the trust property thereof be distributed as the beneficiary thereof should by will appoint, and in default of such appointment, in the case of the Emaroy Trust, the trust property was to be distributed to the aforesaid June, Florence and Kenneth Trust in equal shares, and in the case of the June and Florence Trust, to the surviving issue of the respective beneficiaries thereof, the income only from their share of said principal to be paid to said issue until they respectively should reach the age of twenty-one years, and that in the event the respective beneficiaries of said June and Florence Trusts died leaving no issue, then the respective trust estates were to be distributed in equal shares to the trusts established in favor of the other two children of Douglas Smith, as above set out;

6. That in and by the said trust indenture establishing the general Trust as above set out, the grantor, Douglas Smith, conveyed and assigned to the trustees thereof five hundred thirty-nine (539) shares of the common capital stock of the Pepsodent Company, an Illinois corporation, and provided that the same should be held and managed by said trustees and that out of the net income of said trust they should pay $3,000.00 a month to Emaroy J. Smith and $900.00 a month each to June Keith Slater and Florence Gifford Ellis, during their respective lives, or, in the case of the said Emaroy J. Smith, until the property held by said
7 trustees in the Emaroy Trust should amount in value to $500,000.00, or, in the case of the said June Keith Slater and Florence Gifford Ellis, respectively, the property held by said trustees in the June and Florence Trusts, respectively, should amount to the sum of $300,000.00, said sums so to be paid to the said Emaroy, June and Florence to be abated and diminished proportionately in the event said net income of the General Trust should prove insufficient to pay the full amounts of income as therein directed, and that the said net income of said General Trust in excess of the sums so to be paid to the said beneficiaries thereof, was to be paid 5/11 thereof to the Emaroy Trust and 3/11 thereof to each of the June and Florence Trusts, the said payments to continue until the full principal of the Emaroy, June and Florence Trusts had been established as above set out; that in

and by said trust indenture the grantor provided that in the event of the death of the said wife of the grantor or of either of his said daughters, no further payment should be made to the separate trust created for the benefit of such person so dying but the payments of income which were to be made under the provisions of said General Trust indenture to said separate trust should be apportioned between the separate trusts created for the survivors of the said three beneficiaries of the said General Trust, that in case of the death of either of said daughters of Douglas Smith leaving children her surviving, a portion of the principal of the General Trust should thereupon be set aside in value sufficient, when added to the value of the principal of the separate trust created for the benefit of the daughter so dying, to make up a total of $300,000.00, said portion of said principal to be known as the Supplemental Fund, that the income therefrom should be paid to children of the daughter so dying in equal shares during their lives until they respectively arrived at the age of twenty-one years, and that upon their respectively reaching that age, the principal from which they should then be receiving said income should be delivered to them respectively as their absolute property; that in and by said trust indenture establishing the General Trust, the grantor further provided that upon the establishment of the full principal of the said Emaroy, June and Florence Trusts, as above set out, or their prior termination, the principal of the said General Trust, except said Supplemental Fund or Funds, should be delivered to the Kenneth Trust, or if Kenneth G. Smith should have then attained the age of forty (40) years, the same should be delivered to him as his absolute property, or, if he should not then be living, to such other persons as were entitled to the principal of the Kenneth Trust under the terms thereof;

7. That in and by the said trust indenture creating the Kenneth Trust as aforesaid, the grantor, Douglas Smith, conveyed and assigned to the trustees thereof one hundred (100) shares of the common capital stock of the Pepsodent Company, an Illinois corporation, and provided that the same should be held and managed by the said trustees and the net income thereof paid to the said Kenneth G. Smith in monthly installments until he attained the age of forty (40) years at which time the principal of said trust should be delivered to him as his absolute property, that in case of the death of Kenneth G. Smith prior to his attaining the said

age of forty (40) years, said principal should be paid over and delivered as the said Kenneth G. Smith might by will appoint, that in default of such appointment, if he died leaving issue and/or a widow, said principal should be divided between them in the proportions therein set out, but if the said Kenneth G. Smith died leaving a widow and no issue, then one-third of said principal should go to said widow and two-thirds thereof should be divided equally between the June and Florence Trusts, and that if he died leaving no issue and no widow, the whole of the said principal should be divided equally between the said June and Florence Trusts;

8. That in each of the said five trust indentures it
9 was provided that in the case of refusal or inability of a trustee to act or in the case of the death of a trustee, the remaining trustees should have the authority and duty to appoint a successor trustee, providing, however, that one trustee always should be a bank or trust company of the City of Chicago; that each of said five trust indeutures creating the said Emaroy, June, Florence, Kenneth and General Trusts, contained a provision, identically the same in each indenture, in the words as follows:

"Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors.";

9. That true and correct copies of said five trust indentures containing the provisions of the said Emaroy, June, Florence, Kenneth and General Trusts are attached hereto and marked respectively, in the order named, "Exhibit A", "Exhibit B", "Exhibit C", "Exhibit D", and "Exhibit E" and said copies of said trust indentures and the provisions therein contained are by this reference incorporated herein and made a part hereof as fully as if herein set out at length;

10. That under the terms of each of said five trust indentures, Douglas Smith had no control over said trusts or any of them except as one of the three trustees thereof; that except as one of said three trustees, he had no title to the principal of said trusts or of any of them, and had no right to receive the same or to dispose of it; that except as one of said three trustees, he was not entitled to the income of said trusts or any part thereof or entitled to receive the same or to dispose of it or any part thereof, and had no right, title or authority to receive, hold or dispose of the same or any

part thereof except as directed by said trust indentures respectively; that throughout the period of the existence of said five trusts the said Douglas Smith in fact never received, directly or indirectly, to his own use or for his own benefit, any of the income thereof and never exercised any control over the same.

11. That said five trusts continued to exist under the respective terms of the said five trust indentures in the manner above set out from the respective dates of said trust indentures continuously until, to-wit, October 22, 1924, when each of said trust instruments was modified by a separate writing, duly executed by the said Douglas Smith and the other two trustees of the trust thereby established, wherein and whereby the said Douglas Smith resigned as a trustee of each of said trusts and wherein and whereby the remaining trustees appointed a third person, therein named, to succeed him as such trustee; that in and by said modifications, the provision contained in each of said five trust indentures, as above set out, that said trusts and each of them might be revoked or modified by a writing signed by the said Douglas Smith and one of the other two trustees was in each instance so altered that said trust and each of them were not thereafter revocable or subject to modification by the said Douglas Smith either acting alone or in conjunction with any other person;

12. That during the period January 1, 1924, to, to-wit, the 22d day of October of said year, being the date of the execution of the modifications of said five trust indentures as hereinabove set out, the net taxable income of said five trusts amounted to the aggregate sum of $159,240.61; that having theretofore on or about, to-wit, March 14, 1925, filed a tentative income tax return for the calendar year, in which was set out an estimated income tax for said year in the sum of $64,000.00 which did not include any income tax upon or by reason of the said net taxable income of said five trusts for said period, or any part thereof, the said Douglas Smith on or about, to-wit, May 14, 1926, filed with the defendant, Mabel G. Reinecke, the then Collector of Internal Revenue at Chicago, Illinois, his individual income tax return for the said calendar year 1924 and included in his said individual income tax return as Item 9 (b) therein, the aforesaid net taxable income of said five trusts in the said sum of $159,240.61; that the said income of said five trusts for said period in said amount was so included by the said Doug-

las Smith in his said income tax return involuntarily and under protest and duress; that said protest was duly filed in writing by the said Douglas Smith with his said return;

13. That the income taxes due to the United States upon the net taxable income for the year 1924 set out in the said individual return of income so filed by the said Douglas Smith as aforesaid, including the aforesaid net taxable income of said five trusts in the sum of $159,240.61, was the sum of $121,265.95; that said income tax in same amount was assessed against the said Douglas Smith and was by him, involuntarily and under protest and duress and to avoid threatened penalties and distraint of his property, paid to the defendant, the said Mabel G. Reinecke, the then Collector of Internal Revenue of the United States for the First Collection District of Illinois, at Chicago, Illinois, in installments as follows, that is to say, on March 14, 1925, $16,000.00; on May 13, 1925, $14,313.99; on June 12, 1925, $30,313.99; on September 14, 1935, $30,313.98; and on December 14, 1925, $30,313.99; that of the said income taxes for the year 1924 in the said sum of $121,255.95 so assessed against the said Douglas Smith and by him under protest and duress paid to the defendant, Mabel G. Reinecke, as aforesaid, the sum of $59,896.51 was assessed against him and by him involuntarily paid to the defendant, as above set out, upon and by reason of the aforesaid net taxable income of said five trusts in the sum of $159,240.61, which was by him included in his said individual return of income for the year 1924, under protest and duress, as hereinabove set out;

14. That the Revenue Act of 1924 was enacted and became a law on June 2, 1924; that Section 219, Paragraph (g), of that Act provided as follows:

"Where the grantor of a trust has, at any time during
12 the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

15. That the said Douglas Smith never, directly or indirectly, received any of the aforesaid net income of said five trusts in the said sum of $159,240.61 upon which he was required to and did pay income taxes in the said sum of $59,996.51, under protest and duress as aforesaid, other than as one of the said three trustees of said trusts; that through-

out the period from January 1, 1924 to, to-wit, October 22, 1924, the said Douglas Smith alone had no power to revoke said five trusts or any of them or to revest in himself title to any part of the corpus of said trusts or any of them, but said trusts and each of them could be revoked by him and he could revest in himself title to the corpus of said trusts only with the consent in writing of one of the other two trustees thereof, namely, the said Kenneth G. Smith and Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company); that said trusts and each of them remained in existence unrevoked throughout the period from January 1, 1924 to, to-wit, October 22, 1924, as aforesaid, and immediately upon the receipt during said period, of the said income of said five trusts in the net amount of $159,-240.61, or of any part thereof, said income forthwith belonged to and was received and retained by said trusts and the beneficiaries thereof in accordance with the terms of each of said five trust indentures; that said income was in fact distributed by said trustees and was received by said beneficiaries to their own separate use and benefit in accordance with the provisions of said five trust indentures; that such income was not the income of the said Douglas Smith, was never received by him to his own use or for his own benefit, either directly or indirectly, and could not legally be taxed to him;

13 61. That during the said period from January 1, 1924, to to-with October 22, 1924, and prior and subsequent thereto, and under the express provision contained in such five trust indentures, Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company) was entitled to receive compensation from each of said five trusts as one of the trustees thereof, and upon becoming trustee, as aforesaid, and in all its acts as trustee of said five trusts and each of them, said Foreman-State Trust and Savings Bank was a representative of and was acting for the beneficiaries of said five trusts; that the said Kenneth G. Smith, as one of the trustees of said five trusts was likewise, during said period and prior and subsequent thereto, entitled to compensation from each of said five trusts, as one of the trustees thereof, and was a representative of and was acting for the said beneficiaries thereof; that in addition thereto the said Kenneth G. Smith in his individual capacity was otherwise a beneficiary of each of said five trusts under the terms of each of said trust indentures, respectively; that at no time during the year 1924 did

Douglas Smith, the grantor of said five trusts, have power to revest in himself title to any part of the corpus of the said trusts or any of them without the consent in the case of each of said five trusts, of a beneficiary thereof;

17. That the collection from the said Douglas Smith by the defendant, Mabel G. Reinecke, under protest and duress as aforesaid, of said income taxes for calendar wear 1924 in the said sum of $121,255.95, to the extent of the said sum of $59,896.51, assesed and collected from the said Douglas Smith upon and by reason of the inclusion in his income tax return of the said net taxable income of said five trusts in the sum of $159,240.61, was arbitrary, unauthorized, illegal and without warrant of law;

18. That on, to-wit, May 16, 1929, these plaintiffs, as the Executors of the last Will and Testament of Douglas Smith, Deceased, within the time prescribed therefor by law, filed with the then Collector of Internal Revenue for the First Col-
14 lection District of Illinois, at Chicago, Illinois their duly executed claim for refund of income taxes paid by Douglas Smith for the calendar year 1924 in the sum of $68,187.74, in and by which claim for refund plaintiffs claimed that they were entitled to the refund of said income taxes for the calendar year 1924 which had been illegally and forcibly collected from the said Douglas Smith in his lifetime by reason of the inclusion in his net taxable income for said year of the said net taxable income of said five trusts, as hereinabove set out; that on, to-wit, November 29, 1929, said claim for refund was disallowed in full by the Commissioner of Internal Revenue on a schedule dated the day and year last aforesaid, and plaintiffs were notified of said disallowance by the Commisisoner of Internal Revenue by a letter dated, to-wit, November 29, 1928;

19. That by reason of the premises, the defendant, Mabel G. Reinecke, then and there became indebted to and obligated to pay to the said Douglas Smith the said sum of $59,896.51, of which the said Douglas Smith was then and there most wrongfully deprived by the defendant, in the manner and form set forth, together with interest thereon at the rate of 6% per annum from the date when said taxes were paid, and being so indebted, in consideration thereof, the defendant herein then and there undertook and faithfully promised the said Douglas Smith to pay to him the said sum of $59,896.51, together with interest thereon at the rate of six per cent (6%) per annum from the date when said taxes were paid; that

nevertheless the defendant, though often thereunto requested by the said Douglas Smith during his lifetime and thereafter by the plaintiffs as the duly qualified Executors of his Last Will and Testament, has not paid to the said Douglas Smith during his lifetime or to the plaintiffs or to either of them, since the death of the said Douglas Smith the said sum of money or the interest thereon or any part thereof, but wholly refuses so to do, to the damage of the plaintiffs as such Executors, as aforesaid, in the sum of Fifty-nine Thousand
14½ Eight Hundred Ninety-Six and 51/100 ($59,896.51) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid.

Second Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if set out at length herein the first fifteen (15) paragraphs, inclusive, of the First Count hereof and here now further aver and show:

2. That Section 219 of the Revenue Act of 1924, as applied to the facts herein stated, in so far as said section required or requires or has or may be construed to require that the net taxable income of said five trusts for said period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $159,240.61 be included in the net taxable income of the said Douglas Smith, the grantor of said trusts, for the calendar year 1924, and Sections 210 and 211 of the Revenue Act of 1924 in conjunction with the said Section 219 of said Act, as applied to the facts herein stated, in so far as said sections required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of said five trusts for the aforesaid period from January 1, 1924 to, to-wit, October 22, 1924, in the said sum of $159,240.61, or on any part thereof, as being part of his income for the calendar year 1924 and hence taxable to him, personally, were and are ultra vires, unconstitutional, invalid and of no force and effect; that said Sections 210, 211 and 219 of the Revenue Act of 1924 in so far as the same required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of said five trusts for the said period from January 1, 1924, to, to-wit, October 22, 1924 in the said sum of $159,-240.61, or on any part thereof, as aforesaid, levied and levy

a direct tax upon the said Douglas Smith which was not
15 and is not apportioned among the several states according to their respective numbers and was not and is not laid in proportion to the census or enumeration as was and is required by Clause Third of Section 2 of Article I, and by Clause Fourth of Section 9 of said Article I of the Constitution of the United States of America and said sections of the Revenue Act of 1924 in that respect are ultra vires and exceed the limitations placed upon the power and authority of Congress by said Clause Third of Section 2 and Clause Fourth of Section 9 of Article I of the said Constitution of the United States; that said Sections 210, 211 and 219 in so far as they required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of said five trusts, as aforesaid, exceeded and exceed the power and authority conferred on Congress by the Sixteenth Amendment to the Constitution of the United States, and in imposing or levying a tax upon the said Douglas Smith for and upon the said net taxable income of said five trusts, as aforesaid, said sections deprived and deprive the said Douglas Smith of his property without due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States; that for these and other reasons said Sections 210, 211 and 219 of the Revenue Act of 1924, in so far as they required or require or have been or may be construed to require the payment of income taxes by the said Douglas Smith, as aforesaid, were and are, as applied to the facts herein stated, ultra vires, unconstitutional, invalid and of no force and effect;

3. That the collection from the said Douglas Smith by the defendant, Mabel G. Reinecke, under protest and duress, of said income taxes for the calendar year 1924 in the said sum of $121,255.95, as aforesaid, to the extent of the said sum of $59,896.51 assessed and collected from the said Douglas Smith
upon and by reason of the inclusion in his said income
16 tax return of the said net taxable income of said five trusts in the sum of $159,240.61, was arbitrary, unauthorized, illegal and without warrant of law;

4. That on, to-wit, May 16, 1929, these plaintiffs, as the Executors of the Last Will and Testament of Douglas Smith, Deceased, within the time prescribed therefor by law, filed with the then Collector of Internal Revenue for the First Collection District of Illinois, at Chicago, Illinois, their duly executed claim for refund of income taxes paid by Douglas Smith

for the calendar year 1924 in the sum of $68,187.74, in and by which claim for refund plaintiffs claimed that they were entitled to the refund of said income taxes for the calendar year 1924 which had been illegally and forcibly collected from the said Douglas Smith in his lifetime by reason of the inclusion in his net taxable income for said year of the said net taxable income of said five trusts, as hereinabove set out; that on, to-wit, November 29, 1929, said claim for refund was disallowed in full by the Commissioner of Internal Revenue on a schedule dated the day and year last aforesaid, and plaintiffs were notified of said disallowance by the Commissioner of Internal Revenue by a letter dated, to-wit, November 29, 1929;

5. That by reason of the premises, the defendant, Mabel G. Reinecke, then and there became indebted to and obligated to pay to the said Douglas Smith the said sum of $59,896.51, of which the said Douglas Smith was then and there most wrongfully deprived by the defendant, in the manner and form set forth, together with interest thereon at the rate of six per cent (6%) per annum from the date when said taxes were paid, and being so indebted, in consideration thereof, the defendant herein then and there undertook and faithfully promised the said Douglas Smith to pay to him the said sum of $59,896.61, together with interest thereon at the rate of six per cent (6%) per annum from the date when said taxes were paid; that nevertheless the defendant, though often therunto requested by the said Douglas Smith during his
17 lifetime and thereafter by the plaintiffs as the duly qualified Executors of his Last Will and Testament, has not paid to the said Douglas Smith during his lifetime or to the plaintiffs or to either of them, since the death of the said Douglas Smith, the said sum of money or the interest thereon or any part thereof, but wholly refuses so to do, to the damage of the plaintiffs as such Executors, as aforesaid, in the sum of Fifty-nine Thousand Eight Hundred Ninety-six and 51/100 ($59,896.51) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid.

Third Count.

1. Plaintiffs here now incorporate in this count by reference thereto and respect as if herein set out at length the first three (3) paragraphs, inclusive, of the First Count hereof and here now further aver and show:

2. That on or about, to-wit, October 30, 1922, in the City

of Chicago and State of Illinois, the said Douglas Smith, a resident of said City, and a citizen of the United States, by a trust indenture on that day and at the place aforesaid duly executed by him as grantor, and by himself, the said Kenneth G. Smith, and Foreman Bros. Banking Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois (now Foreman-State Trust and Savings Bank) as trustees, established a trust known as the General Trust for the benefit of his wife, Emaroy J. Smith, his two daughters, June Keither Slater and Florence Gifford Ellis, and his son, Kenneth G. Smith, hereinafter sometimes referred to as the beneficiaries under said trust; that in and by said trust indenture the said Douglas Smith, Kenneth G. Smith and Foreman Bros. Banking Company were constituted the trustees of the trust thereby established; that at the time of the establishment of said trust and from thence continuously to and including October 22, 1924, Foreman Bros.
18 Banking Company (later during said period known as Foreman-State Trust and Savings Bank, by which name it is still known) was an Illinois corporation duly authorized to act as a trustee of said trust, and the said Douglas Smith and Kenneth G. Smith were each of them citizens of Illinois, of full age and lawfully qualified to act as trustees of said trust;

3. That in and by the said trust indenture establishing the General Trust as above set out, the grantor, Douglas Smith, conveyed and assigned to the trustees thereof five hundred thirty-nine (539) shares of the common capital stock of the Pepsodent Company, an Illinois corporation, and provided that the same should be held and managed by said trustees and that out of the net income of said trust they should pay Three Thousand Dollars ($3,000) a month to Emaroy J. Smith Nine Hundred Dollars ($900) a month each to June Keith Slater and Florence Gifford Ellis, during their respective lives, or, in the case of the said Emaroy J. Smith, until the property held by said trustees in the Emaroy Trust, another trust which had theretofore been created by the said Douglas Smith for the benefit of his wife, the said Emaroy J. Smith, should amount in value to Five Hundred Thousand Dollars ($500,000.00), and in the case of the said June Keith Slater and Florence Gifford Ellis respectively, the property held by said trustees in the June and Florence Trusts, two other trusts which had been theretofore created by the said Douglas Smith for the benefit respectively of the said June Keith

Slater and Florence Gifford Ellis should amount in the case of each trust respectively, to the sum of Three Hundred Thousand Dollars ($300,000.00), said sums so to be paid to the said Emaroy, June and Florence out of the net income of said General Trust to be abated and diminished proportionately in the event the net income thereof should prove insufficient to pay the full amounts of income as therein directed, and that the said net income of the said General Trust in excess of the sums so to be paid to the said beneficiaries thereof should
19 be paid five-elevenths (5/11) thereof to the aforesaid Emaroy Trust and three-elevenths (3/11) thereof to each of the aforesaid June and Florence Trusts, the said payments to continue until the full principal of the Emaroy, June and Florence Trusts had been established in the amount hereinabove set out; that in and by said trust indenture establishing the General Trust, the grantor provided that in the event of the death of the said wife of the grantor or of either of his said daughters, no further payment should be made to the separate trusts, either the said Emaroy, June or Florence Trusts created as above set out for the benefit of such person so dying but the payments of income which were to be made under the provisions of said General Trust indenture to said separate trusts should be apportioned between the said separate trusts created for the survivors of the said three beneficiaries of the said General Trust, that in case of the death of either of said daughters of Douglas Smith leaving children her surviving, a portion of the principal of the said General Trust should thereupon be set aside in value sufficient, when added to the value of the principal of the separate trusts created, as above set out, for the benefit of the daughters so dying, to make up a total of $300,000.00, said portion of said principal to be known as the Supplemental Fund, that the income from said Supplemental Fund should be paid to the children of the daughter so dying. in equal shares during their lives until they respectively arrive at the age of twenty-one (21) years, and that upon their respectively reaching that age, the principal from which they should then be receiving said income should be delivered to them respectively as their absolute property; that in and by said trust indenture establishing the General Trust the grantor further provided that upon the establishment of the full principal of the said Emaroy, June and Florence Trusts, as above set out, or their prior termination, the principal of the said General Trust, ex-
20 cept said Supplemental Fund or Funds, should be delivered to the Kenneth Trust, another trust theretofore cre-

ated by the said Douglas Smith for the benefit of Kenneth C. Smith, his son, or if the said Kenneth G. Smith had then attained the age of forty (40) years, (at which time the said Kenneth Trust terminated under its terms) said principal should be delivered to the said Kenneth G. Smith as his absolute property, or, if he was then not living, to such other persons as were entitled to the principal of the said Kenneth Trust under the terms thereof;

4. That in said trust indenture establishing the said General Trust it was provided that in the case of refusal or inability of a trustee to act or in the case of the death of a trustee, the remaining trustees had the authority and duty to appoint a successor trustee, providing, however, that one trustee always should be a bank or trust company of the City of Chicago; that said trust indenture establishing the said General Trust contained a provision in the words as follows:

"Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors.";

5. That a true and correct copy of the said trust indenture containing the provisions of the General Trust is attached hereto and marked Exhibit "E" and said copy of said trust indenture and the provisions therein contained are by this reference incorporated herein and made a part hereof as fully as if herein set out at length;

6. That under the terms of the trust indenture establishing the said General Trust and the said Kenneth, Emaroy, June and Florence Trusts, the said Douglas Smith was not a beneficiary of said trusts, or any of them, either as to the principal or the income thereof; that the said Douglas Smith had no control over said trusts or any of them except as
21 one of the three trustees thereof; that except as one of said three trustees, he had no title to the principal of said trusts or of any of them and had no right to receive the same or dispose of it; that except as one of said three trustees, he was not entitled to the income of said trusts or any part thereof, or entitled to receive the same or to dispose of it or any part thereof, and had no right, title or authority to receive, hold or dispose of the same or any part thereof except as directed by said trust indentures respectively; that throughout the period of the existence of said trusts, the said Douglas Smith in fact never received, directly or indirectly, to his own use or his own benefit, any of the income thereof and never exercised any control over the same;

7. That the said General Trust and the said Kenneth, Emaroy, June, and Florence Trusts continued to exist under the terms of their said trust indentures respectively, in the manner above set out, from the respective dates of the establishment of said trusts continuously until, to-wit, October 22, 1924, when the said trust instrument establishing the said General Trust was modified by a separate writing, duly executed by the said Douglas Smith and the other two trustees of said trust, wherein and whereby the said Douglas Smith resigned as trustee of said General Trust and wherein and whereby the remaining trustees appointed a third person, therein named, to succeed him as such trustees; that in and by said modification, the provision contained in said trust indenture establishing the said General Trust that said trust might be revoked or modified by a writing signed by the said Douglas Smith and one of the other two trustees thereof, as above set out, was so altered that said trust was not thereafter revocable or subject to modification by the said Douglas Smith, either acting alone or in conjunction with any other person;

8. That during the period from January 1, 1924, to, to-wit, the 22nd day of October of said year, being the date
22 of the execution of the aforesaid modification of said trust indenture establishing the General Trust, as hereinabove set out, the net taxable income of the said General Trust amounted to the sum of $110,495.00; that having theretofore on or about, to-wit, March 14, 1925, filed a tentative income tax return for the calendar year 1924, in which was set out an estamted income tax for said year in the sum of $64,000.00 which did not include any income tax upon or by reason of the said net taxable income of said General Trust for said period or upon or by reason of any part thereof, the said Douglas Smith on or about, to-wit, May 14, 1925, filed with the defendant, Mabel G. Reinecke, the then Collector of Internal Revenue, at Chicago, Illinois, his individual income tax return for the said calendar year 1924 and included in his said individual income tax return, at Item 9 (b) therein, the aforesaid net taxable income of the said General Trust in the aforesaid sum of $110,495.00; that the said net taxable income of said General Trust for said period in said amount was included by the said Douglas Smith in his said income tax return involuntarily and under protest and duress; that said protest was duly filed in writing by the said Douglas Smith with his said return;

9. That the income taxes due to the United States upon the net taxable income for the calendar year 1924, as set out in the said individual return of income so filed by the said Douglas Smith as aforesaid, including the aforesaid net taxable income of the said General Trust in the said sum of $110,495.00 was the sum of $121,255.95; that the said income tax in said amount was assessed against the said Douglas Smith and was by him involuntarily and under protest and duress and to avoid threatened penalties and distraint of his property, paid to the defendant, the said Mabel G. Reinecke, the then Collector of Internal Revenue of the United States for the First Collection District of Illinois at Chicago, Illinois, in installments as follows, that is to say, on March 14, 1925, $16,000; on May 13, 1924, $14,313.99; on June 12, 1925, $30,313.99; on September 14, 1925, $30,313.98, and on December 14, 1925, $30,313.99; that of the said income taxes for the year 1924 in the said sum of $121,255.95 so assessed against the said Douglas Smith and by him under protest and duress paid to the defendant, Mabel G. Reinecke, as aforesaid, the sum of $41,860.63 was assessed against him and by him involuntarily paid to the defendant, as above set out, upon and by reason of the aforesaid net taxable income of the said General trust for the period aforesaid in the said sum of $110,495.00, which was by him included in his said individual return of income for the year 1924 under protest and duress, as hereinabove set out;

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10. That the Revenue Act of 1924 was enacted and became a law on June 2, 1924; that Section 219, paragraph (g), of that Act provided as follows:

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

11. That the said Douglas Smith never, directly or indirectly, received any of the aforesaid net income of the said General Trust in the said sum of $110,495.00 upon which he was required to and did pay income taxes to the defendant in the said sum of $41,860.63, as aforesaid, other than as one of the three trustees of said General Trust and of said Emaroy, June and Florance Trusts; that throughout the period from January 1, 1924, to, to-wit, October 22, 1924, the said Douglas Smith alone had no power to revoke the said Gen-

eral Trust or to revest in himself title to any part of the corpus of said trust, but the said General Trust could be revoked by him and he could revest in himself title to the corpus of said trust only with the consent of one of the other two trustees thereof, namely, the said Kenneth G. Smith and Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company); that the said General Trust remained in existence unrevoked throughout the period from January 1, 1924, to, to-wit, October 22, 1924, as aforesaid, and immediately upon the receipt during said period, of the said income of the said General Trust or any part thereof, said income forthwith belonged to the said General Trust and the beneficiaries thereof in accordance with the terms of its trust indenture; that said income was in fact distributed by said trustees to and was received and retained by the beneficiaries of said General Trust to their own separate use and benefit in accordance with the provisions of its trust indenture; that the income of the said General Trust was not the income of the said Douglas Smith, was never received by him, directly or indirectly, to his own use and benefit, and could not legally be taxed to him;

12. That during the said period from January 1, 1924, to, to-wit, October 22, 1924, and prior and subsequent thereto, and under the express provision made therefor in the trust indenture of said General Trust, the said Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company) was entitled to receive compensation from said trust as one of the trustees thereof, and upon becoming trustee thereof as aforesaid and in all its acts as a trustee of said trust, said Foreman-State Trust and Savings Bank was a representative of and was acting for the beneficiaries of said General Trust; that the said Kenneth G. Smith, as one of the trustees of the said General Trust, was likewise during said period and prior and subsequent thereto entitled to compensation from said General Trust, and was a representative of and was acting for the said beneficiaries thereof; that in addition, the said Kenneth G. Smith in his individual capacity was otherwise a beneficiary of the said General Trust under the terms of its said trust indenture; that at no time during the year 1924 did Douglas Smith, the grantor of said General Trust, have power to revest in himself title to any part of the corpus of said trust without the consent of a beneficiary thereof;

13. That the collection from the said Douglas Smith by the defendant, Mabel G. Reinecke, under protest and

duress, as aforesaid, of said income taxes, for the calendar year 1924 in the said sum of $121,255.95, as aforesaid, to the extent of the said sum of $41,860.63, assessed and collected from the said Douglas Smith upon and by reason of the inclusion in his income tax return of the said net taxable income of the said General Trust in the said sum of $110,495.00, as above set out, was arbitrary, unauthorized, illegal and without warrant of law;

14. That on, to-wit, May 16, 1929, these plaintiffs as the executors of the last Will and Testament of Douglas Smith, Deceased, within the time prescribed therefor by law, filed with the then Collector of Internal Revenue for the First Collection District of Illinois, at Chicago, Illinois, their duly executed claim for refund of income taxes paid by Douglas Smith for the calendar year 1924 in the sum of $68,187.74, in and by which claim for refund, plaintiffs claimed the refund of said income taxes for the calendar year 1924, which had been illegally and forcibly collected from the said Douglas Smith in his lifetime, in the said sum of $41,860.63, by reason of the inclusion in his net taxable income for said year of the net taxable income of the said General Trust for the period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $110,495.00, as hereinabove set out; that on, to-wit, November 29, 1929, said claim for refund was disallowed in full by the Commissioner of Internal Revenue on a schedule dated the day and year last aforesaid, and plaintiffs were notified of said disallowance by the Commissioner of Internal Revenue by a letter dated, to-wit, November 29, 1929;

15. That by reason of the premises, the defendant, Mabel G. Reinecke, then and there became indebted to and obligated to pay to the said Douglas Smith the said sum of $41,860.63, of which the said Douglas Smith was then and there most wrongfully deprived by the defendant, in the manner and
26 form set forth, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid, and being so indebted, in consideration thereof, the defendant herein then and there undertook and faithfully promised the said Douglas Smith to pay to him the said sum of $41,860.63, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid; that nevertheless the defendant, though often thereunto requested by the said Douglas Smith during his lifetime and thereafter by the plaintiffs as the duly qualified Executors of his Last Will and Testament, has not paid to the said Douglas

Smith during his lifetime or to the plaintiffs or to either of them, since the death of the said Douglas Smith, the said sum of money or the interest thereon or any part thereof, but wholly refuses so to do, to the damage of the plaintiffs as such Executors, as aforesaid, in the sum of Forty-one Thousand Eight Hundred Sixty and 63/100 ($41,860.63) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid.

Fourth Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if herein set out at length the first eleven paragraphs, inclusive, of the Third Count hereof, and here now further aver and show:

2. That Section 219 of the Revenue Act of 1924, as applied to the facts herein stated, in so far as said section required or requires or has or may be construed to require that the net taxable income of the General Trust for said period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $110,495.00 be included in the net taxable income of the said Douglas Smith, the grantor of said trusts, for the calendar year 1924, and Sections 210 and 211 of the Revenue Act of 1924 in conjunction with the said Section 219 of said Act, as applied to the facts herein stated, in so far as said sec-
27 tions required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the General Trust for the aforesaid period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $110,495.00, or on any part thereof, as being part of his income for the calendar year 1924 and hence taxable to him, personally, were and are ultra vires, unconstitutional, invalid and of no force and effect; that said Sections 210, 211 and 219 of the Revenue Act of 1924 in so far as the same required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the General Trust for the said period from January 1, 1924, to, to-wit, October 22, 1924 in the said sum of $110,495.00, or on any part thereof, as aforesaid, levied and levy a direct tax upon the said Douglas Smith which was not and is not apportioned among the several States according to their respective numbers and was not and is not laid in proportion to the census or enumeration as was

and is required by Clause Third of Section 2 of Article I and by Clause Fourth of Section 9 of said Article I of the Constitution of the United States of America and said sections of the Revenue Act of 1924 in that respect are ultra vires and exceed the limitations placed upon the power and authority of Congress by said Clause Third of Section 2 and Clause Fourth of Section 9 of Article I of said Constitution of the United States; that said Sections 210, 211 and 219 in so far as they required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the General Trust, as aforesaid, exceeded and exceed the power and authority conferred on Congress by the Sixteenth Amendment to the Constitution of the United States, and in imposing or levying a tax upon the said Douglas Smith for and upon the said net taxable income of the General Trust, as afore-
28 said, said sections deprived and deprive the said Douglas Smith of his property without due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States; that for these and other reasons said Sections 210, 211 and 219 of the Revenue Act of 1924, in so far as they required or require or have been or may be construed to require the payment of income taxes by the said Douglas Smith, as aforesaid, were and are, as applied to the facts herein stated, ultra vires, unconstitutional, invalid and of no force and effect;

3. Plaintiffs here now incorporate in this count by reference thereto and repeat as if set out at length herein Paragraphs 13, 14, and 15 of said Third Count of this Decloration.

Fifth Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if herein set out at length the first three (3) paragraphs inclusive, of the First Count hereof and here now further aver and show:

2. That on or about, to-wit, September 25, 1922, in the City of Chicago and State of Illinois, the said Douglas Smith, a resident of said City, and a citizen of the United States, by a trust indenture on that day and at the place aforesaid duly executed by him as grantor and by himself, the said Kenneth G. Smith, and Foreman Bros. Banking Company, a corporation organized and existing under and by virtue of the laws

of the State of Illinois (now Foreman-State Trust and Savings Bank), as trustees, established a trust known as the Kenneth Trust for the benefit of his son, Kenneth G. Smith, hereinafter sometimes referred to as the beneficiary under said trust; that in and by said trust indenture the said Douglas Smith, Kenneth G. Smith and Foreman Bros. Banking Company were constituted the trustees of the trust thereby established; that at the time of the establishment of said trust and from thence continuously to and including October
29 22, 1924, Foreman Bros. Banking Company (later during said period known as The Foreman Trust and Savings Bank, now Foreman-State Trust and Savings Bank) was an Illinois corporation duly authorized to act as a trustee of said trust, and the said Douglas Smith and Kenneth G. Smith were each of them citizens of Illinois, of full age and lawfully qualified to act as trustees of said trust;

3. That in and by the said trust indenture establishing the Kenneth Trust, as above set out, the grantor, Douglas Smith conveyed and assigned to the Trustees thereof one hundred (100) shares of the common capital stock of the Pepsodent Company, an Illinois corporation and provided that the same should be held and managed by the said trustees and the net income thereof paid to the said Kenneth G. Smith in monthly installments until he attained the age of forty (40) years at which time the principal of said trust should be delivered to him as his absolute property, that in case of the death of Kenneth G. Smith prior to his attaining the said age of forty (40) years the said principal should be paid over and delivered as the said Kenneth G. Smith might by Will appoint, that in default of such appointment if he should die leaving issue and/or a widow, said principal should be divided between them in the proportions therein set out, but if the said Kenneth G. Smith should die leaving a widow and no issue, then one-third (1/3) of said principal should go to such widow and two-thirds (2/3) thereof should be divided equally between the June Trust and the Florence Trust, two other trusts which had been established by the said Douglas Smith for the benefit respectively of his daughters, June Keith Slater and Florence Gifford Ellis, at the same time that he established the said Kenneth Trust, as aforesaid, and that if the said Kenneth G. Smith should die leaving no issue and no widow, the whole of said principal should be divided equally between the said June and Florence Trusts;

4. That in said trust indenture establishing the said Ken-

neth Trust it was provided that in the case of the death
30 of a trustee, the remaining trustees had the authority and duty to appoint a successor trustee, providing, however, that one trustee always should be a bank or trust company of the City of Chicago; that said trust indenture establishing the said Kenneth Trust contained a provision in the words as follows:

"Anything herein contained to the contrary notwithstanding, this trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors.";

5. That true and correct copy of the said trust indenture containing the provisions of the said Kenneth Trust is attached hereto and marked Exhibit "D" and said copy of said trust indenture and the provisions therein contained are by this reference incorporated herein and made a part hereof as fully as if herein set out at length;

6. That under the terms of the trust indenture establishing the said Kenneth Trust, and the said June and Florence Trusts, the said Douglas Smith was not a beneficiary of said trusts, or any of them, either as to the principal or the income thereof; that the said Douglas Smith had no control over said trusts or any of them except as one of the said three trustees thereof; that except as one of said three trustees, he had no title to the principal of said trusts or of any of them, and had no right to receive the same or dispose of it; that except as one of said three trustees he was not entitled to the income of said trusts, or any part thereof, or entitled to receive the same or to dispose of it or any part thereof; and had no right, title or authority to receive, hold or dispose of the same or any part thereof except as directed by said trust indentures respectively; that throughout the period of the existence of said trusts, the said Douglas Smith, in fact, never received, directly or indirectly, to his own use or for his own benefit, any of the income thereof, and never exercised any control over the same;

7. That the said Kenneth Trust and the said June and
31 Florence Trusts continued to exist under the terms of their said trust indentures, respectively, in the manner above set out, from the respective dates of the establishment of said trusts continuously until, to-wit, October 22, 1924, when the said trust instrument establishing the said Kenneth Trust was modified by a separate writing, duly executed by the said Douglas Smith and the other two trustees of said

trust, wherein and whereby the said Douglas Smith resigned as trustee of the said Kenneth Trust and wherein and whereby the remaining trustees appointed a third person therein named to succeed him as such trustee; that in and by said modification the provision contained in said trust indenture establishing the said Kenneth Trust, that the said trust might be revoked or modified by a writing signed by the said Douglas Smith and one of the other two trustees thereof, as above set out, was so altered that said trust was not thereafter revocable or subject to modification by the said Douglas Smith, either acting alone or in conjunction with any other person;

8. That during the period from January 1, 1924, to, to-wit, the 22d day of October of said year, being the date of the execution of the aforesaid modification of said trust indenture establishing the Kenneth Trust, as herein above set out, the net taxable income of the said Kenneth Trust amounted to the sum of $20,500.00; that having theretofore on or about, to-wit, March 14, 1925, filed a tentative income tax return for the calendar year 1924, in which was set out an estimated income tax for said year in the sum of $64,000.00 which did not include any income tax upon or by reason of the said net taxable income of the said Kenneth Trust for said period, or upon or by reason of any part thereof, the said Douglas Smith on or about, to-wit, May 14, 1925, filed with the defendant, Mabel G. Reinecke, the then Collector of Internal Revenues, at Chicago, Illinois, his individual income tax return for
32 the said calendar year 1924, and included in his said individual income tax return, at Item 9 (b) therein, the aforesaid net taxable income of the said Kenneth Trust in the aforesaid sum of $20,500.00; that the said net taxable income of the said Kenneth Trust for said Period in said amount was included by the said Douglas Smith in his said income tax return involuntarily and under protest and duress; that said protest was duly filed in writing by the said Douglas Smith with his said return;

9. That the income taxes due to the United States upon the net taxable income for the calendar year 1924, as set out in the said individual return of income so filed by the said Douglas Smith, as aforesaid, including the aforesaid net taxable income of the said Kenneth Trust in the said sum of $20,500.00 was the sum of $121,255.95; that said income taxes in said amount was assessed against the said Douglas Smith and was by him, involuntarily and under protest and duress, and to avoid threatened penalties and distrain of his property,

paid to the defendant, the said Mabel G. Reinecke, the then Collector of Internal Revenue of the United States for the First Collection District of Illinois, at Chicago, Illinois, in installments as follows, that is to say, on March 14, 1925, $16,000; on May 13, 1925, $14,313.99; on June 12, 1925, $30,313.99; on September 14, 1925, $30,313.98; and on December 14, 1925, $30,313.99; that of the said income taxes for the year 1924 in the said sum of $121,255.95 so assessed against the said Douglas Smith and by him under protest and duress paid to the defendant, Mabel G. Reinecke, as aforesaid, the sum of $7,790.00 was assessed against him and by him involuntarily paid to the defendant, as above set out, upon and by reason of the aforesaid net taxable income of the said Kenneth Trust for the period aforesaid in the said sum of $20,500.00, which was by him included in his said individual return of income for the year 1924, under protest and duress, as hereinabove set out;

10. That the Revenue Act of 1924 was enacted and be-
33 came a law on June 2, 1924; that Section 219, paragraph (g), of that Act provided as follows:

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.";

11. That the said Douglas Smith never directly or indirectly received any of the aforesaid net income of the said Kenneth Trust in the said sum of $20,500.00 upon which he was required to and did pay income taxes to the defendant in the said sum of $7,790.00, as aforesaid, other than as one of the three trustees of the said Kenneth Trust; that throughout the period from January 1, 1924, to, to-wit, October 22, 1924, the said Douglas Smith alone had no power to revoke the said Kenneth Trust or to revest in himself title to any part of the corpus of said trust, but the said Kenneth Trust could be revoked by him and he could revest in himself title to the corpus of said trust only with the consent of one of the two other trustees thereof, namely, the said Kenneth G. Smith and Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company); that the said Kenneth Trust remained in existence unrevoked throughout the period from January 1, 1934, to, to-wit, October 22, 1924, as aforesaid, and immediately upon the receipt during said period of the said income of the said Kenneth Trust, or any part thereof, said

income forthwith belonged to the said Kenneth Trust and to the beneficiary thereof in accordance with the terms of its trust indenture; that the said income was, in fact, distributed by said trustees to and was received by the said Kenneth G. Smith, the beneficiary of the said Kenneth Trust, to his own separate use and benefit in accordance with the provisions of the trust indenture establishing the same, as hereinabove
34 set out; that the income of the said Kenneth Trust was not the income of the said Douglas Smith, was never receivel by him, directly or indirectly, to his own use and benefit, and could not legally be taxed to him;

12. That during the said period from January 1, 1924 to, to-wit, October 22, 1924, and prior and subsequent thereto, and under the express provisions made therefor in the trust indenture of said Kenneth Trust, the said Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company) was entitled to receive compensation from said trust as one of the trustees thereof, and upon becoming a trustee thereof as aforesaid and in all its acts as a trustee of said trust, said Foreman-State Trust and Savings Bank was a rep-representative of and was acting for the beneficiaries of said Kenneth Trust; that the said Kenneth G. Smith, as one of the trustees of the said Kenneth Trust was likewise during said period and prior and subsequent thereto entitled to compensation from said Kenneth Trust, and was a representative of and was acting for the said beneficiaries thereof; that in addition, the said Kenneth G. Smith in his individual capacity was otherwise a beneficiary of the said Kenneth Trust under the terms of its trust indenture; that at no time during the year 1924 did Douglas Smith, the grantor of said Kenneth Trust, have power to revest in himself title to any part of the corpus of said trust without the consent of a beneficiary thereof;

13. That the collection from the said Douglas Smith by the defendant, Mabel G. Reinecke, under protest and duress, as aforesaid, of said income taxes, for the calendar year 1924 in the said sum of $121,255.95, as aforesaid, to the extent of the said sum of $7,790.00, assessed and collected from the said Douglas Smith upon and by reason of the inclusion in his income tax return of the said net taxable income of the said Kenneth Trust in the said sum of $20,500.00, a above set out, was arbitrary, unauthorized, illegal and without warrant of law;

14. That on, to-wit, May 16, 1929, these plaintiffs as
35 the Executors of the Last Will and Testament of Douglas Smith, Deceased, within the time prescribed therefor by law, filed with the then Collector of Internal Revenue for the First Collection District of Illinois, at Chicago, Illinois, by their duly executed claim for refund of income taxes paid by Douglas Smith for the calendar year 1924 in the sum of $68,-187.74, in and by which claim for refund, plaintiffs claimed the refund of said income taxes for the calendar year 1924, which had been illegally and forcibly collected from the said Douglas Smith in his lifetime, in the said sum of $7,790.00, by reason of the inclusion in his net taxable income for said year of the net taxable income of the said Kenneth Trust for the period from January 1, 1924 to, to-wit, October 22, 1924, in the said sum of $20,500.00, as hereinabove set out; that on, to-wit, November 29, 1929, said claims for refund was disallowed in full, by the Commissioner of Internal Revenue on a schedule dated the day and year last aforesaid, and plaintiffs were notified of said disallowance by the Commissioner of Internal Revenue by letter dated, to-wit, November 29, 1929;

15. That by reason of the premises, the defendant, Mabel G. Reinecke, then and there became indebted to and obligated to pay to the said Douglas Smith the said sum of $7,790.00 of which the said Douglas Smith was then and there most wrongfully deprived by the defendant, in the manner and form set forth, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid; and being so indebted, in consideration thereof, the defendant herein then and there undertook and faithfully promised the said Douglas Smith to pay to him the said sum of $7,790.00, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid; that nevertheless the defendant, though often thereunto requested by the said Douglas Smith during his lifetime and thereafter by the plaintiffs as the duly qualified Executors of his last Will and Testament, has not paid to the said Douglas Smith dur-
36 ing his lifetime or to the plaintiffs or to either of them, since the death of the said Douglas Smith, the said sum of money or the interest thereon or any part thereof, but wholly refuses so to do, to the damage of the plaintiffs as such Executors, as aforesaid, in the sum of Seven Thousand Seven Hundred Ninety ($7,790) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid.

Sixth Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if herein set out at length the first eleven paragraphs, inclusive, of the Fifth Count hereof, and here now further aver and show:

2. That Section 219 of the Revenue Act of 1924, as applied to the facts herein stated, in so far as said section required or requires or has or may be construed to require that the net taxable income of the Kenneth Trust for said period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $20,500.00 be included in the net taxable income of the said Douglas Smith, the grantor of said trusts, for the calendar year 1924, and Sections 210 and 211 of the Revenue Act of 1924 in conjunction with the said Section 219 of said Act, as applied to the facts herein stated, in so far as said sections required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the Kenneth Trust for the aforesaid period from January 1, 1924 to, to-wit, October 22, 1924, in the said sum of $20,500.00, or on any part thereof, as being part of his income for the calendar year 1924 and hence taxable to him personally, were and are ultra vires, unconstitutional, invalid and of no force and effect; that said Sections 210, 211 and 219 of the Revenue Act of 1924 in so far as the same required or require or have been or may be construed to require that the said Douglas Smith pay income
37 taxes to the United States upon the said net taxable income of the Kenneth Trust for the said period from January 1, 1924 to, to-wit, October 22, 1924 in the said sum of $20,500.00, or on any part thereof, as aforesaid, levied and levy a direct tax upon the said Douglas Smith which was not and is not apportioned among the several States according to their respective numbers and was not and is not laid in proportion to the census or enumeration as was and is required by Clause Third of Section 2 of Article I and by Clause Fourth of Section 9 of said Article I of the Constitution of the United States of America and said sections of the Revenue Act of 1924 in that respect are ultra vires and exceed the limitations placed upon the power and authority of Congress by said Clause Third of Section 2 and Clause Fourth of Section 9 of Article I of said Constitution of the United States; that said Sections 210, 211 and 219 in so far as they required or require or have been or may be construed to require that the

said Douglas Smith pay income taxes to the United States upon the said net taxable income of the Kenneth Trust, as aforesaid, exceeded and exceed the power and authority conferred on Congress by the Sixteenth Amendment to the Constitution of the United States, and in imposing or levying a tax upon the said Douglas Smith for and upon the said net taxable income of the Kenneth Trust, as aforesaid, said sections deprived and deprive the said Douglas Smith of his property without due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States; that for these and other reasons said Sections 210, 211, and 219 of the Revenue Act of 1924, in so far as they required or require or have been or may be construed to require the payment of income taxes by the said Douglas Smith, as aforesaid, were and are, as applied to the facts herein stated, ultra vires, unconstitutional, invalid and of no force and effect;

3. Plaintiffs here incorporate in this count by reference thereto and repeat as if set out at length herein Paragraphs 13, 14 and 15 of said Fifth Count of this Declaration.

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Seventh Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if herein set out at length the first three (3) paragraphs, inclusive, of the First Count hereof and here now further aver and show:

2. That on or about, to-wit, September 25, 1922, in the City of Chicago and State of Illinois, the said Douglas Smith, a resident of said City, and a citizen of the United States, by a trust indenture on that day and at the place aforesaid duly executed by him as grantor and by himself, the said Kenneth G. Smith, and Foreman Bros. Banking Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois (now Foreman-State Trust and Savings Bank), as trustees, established trust known as the Emaroy Trust for the benefit of his wife, Emaroy J. Smith, hereinafter sometimes referred to as the beneficiary under said trust; that in and by said trust indenture the said Douglas Smith, Kenneth G. Smith and Foreman Bros. Banking Company were constituted the trustees of the trust thereby established; that at the time of the establishment of said trust and from thence continuously to and including October 22, 1924, Foreman Bros. Banking Company (later during said period

known as The Foreman Trust and Savings Bank, now Foreman-State Trust and Savings Bank) was an Illinois corporation duly authorized to act as a trustee of said trust, and the said Douglas Smith and Kenneth G. Smith were each of them citizens of Illinois, of full age and lawfully qualified to act as trustees of said trust;

3. That in and by the said trust indenture establishing the Emaroy Trust, as above set out, the grantor, Douglas Smith, conveyed and assigned to the trustees thereof fifty (50) shares of the common capital stock of the Pepso-
39 dent Company, an Illinois corporation, and provided that the same should be held and managed by said trustees and that the income therefrom and from all other trust property should be by them collected and revested and accumulated until said stock and all said accumulations and additions thereto amounted to the sum of $500,000.00 and thereafter said trustees should pay over the net income of said trust to the said Emaroy J. Smith during her life; that in and by said trust instrument establishing the Emaroy Trust it was further provided that upon the death of the said Emaroy J. Smith the trust should thereupon terminate and the trust property be distributed as the said beneficiary should by will appoint, and that in default of such appointment said trust property should be distributed to the June, Florence and Kenneth Trusts, three other trusts established by the said Douglas Smith for the benefit respectively of his son, Kenneth G. Smith, and his two daughters, June Keith Slater and Florence Gifford Ellis, at the same time the said Emaroy Trust was established, as above set out, in equal shares;

4. That in said trust indenture establishing the said Emaroy Trust it was provided that in the case of the death of a trustee, the remaining trustees had the authority and duty to appoint a successor trustee, providing, however, that one trustee always should be a bank or trust company of the City of Chicago; that said trust indenture establishing the said Emaroy Trust contained a provision in the words as follows:

"Anything herein contained to the contrary notwithstanding, this trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors.";

5. That a true and correct copy of the said trust indenture containing the provisions of the said Emaroy Trust is

attached hereto and marked Exhibit "A" and said copy of said trust indenture and the provisions therein contained are by this reference incorporated herein and made a part hereof as fully as if herein set out at length;

6. That under the terms of the trust indentures establishing the said Emaroy Trust and the said Kenneth, June and Florence Trusts, the said Douglas Smith is not a beneficiary of said trusts, or any of them, either as to the principal or the income thereof; that the said Douglas Smith had no control over said trusts or any of them, except as one of the three trustees thereof; that except as one of said three trustees, he had no title to the principal of said trusts, or of any of hem, and had no right to receive the same or dispose of it; that except as one of said three trustees he was not entitled to the income of said trusts, or any part thereof, or entitled to receive the same or dispose of it, or any part thereof, and had no right, title or authority to receive, hold, or dispose of the same or any part thereof except as directed by said trust indentures, respectively; that throughout the period of the existence of said trusts, the said Douglas Smith, in fact, never received, directly or indirectly, to his own use or for his own benefit, any of the income thereof, and never exercised any control over the same;

7. That the said Emaroy Trust and the said Kenneth, June and Florence Trusts continued to exist under the terms of their said trust indentures respectively, in the manner above set out, from the date of the establishment of said trusts continuously until, to-wit, October 22, 1924, when the said trust instrument establishing the said Emaroy Trust was modified by a separate writing, said Douglas Smith and the other two trustees of said trust, wherein and whereby the said Douglas Smith resigned as trustee of the said Emaroy Trust and wherein and whereby the remaining trustees appointed a third person therein named to succeed him as such trustee; that in and by said modification, the provision contained in said trust indenture establishing the said Emaroy Trust, as above set out, that the said trust might be revoked or modified by a writing signed by the said Douglas Smith and one of the other two trustees thereof, as above set out, was so altered that said trust was not thereafter revocable or subject to modification by the said Douglas Smith, either acting alone or in conjunction with any other person;

8. That during the period from January 1, 1924, to, to-

wit, the 22d day of October of said year, being the date of the execution of the aforesaid modification of said trust indenture establishing the Emaroy Trust, as hereinabove set out, the net taxable income of the said Emaroy Trust amounted to the sum of $12,794.97; that having theretofore on or about, to-wit, March 14, 1925, filed a tentative income tax return for the calendar year 1924, in which was set out an estimated income tax for said year in the sum of $64,000.00, which did not include any income tax upon or by reason of the said net taxable income of the said Emaroy Trust for said period, or upon or by reason of any part thereof, the said Douglas Smith on or about, to-wit, May 14, 1925, filed with defendant, Mabel G. Reinecke, the then Collector of Internal Revenue, at Chicago, Illinois, his individual income tax return for the said calendar year 1924, and included in his said individual income tax return, at Item 9 (b) therein, the aforesaid net taxable income of the said Emaroy Trust in the aforesaid sum of $12,794.97; that the said net taxable income of the said Emaroy Trust for said period in said amount was included by the said Douglas Smith in his said income tax return involuntarily and under protest and duress; that said protest was duly filed in writing by the said Douglas Smith with his said return;

9. That the income taxes due to the United States upon the net taxable income for the calendar year 1924, as set out in the said individual return of income so filed by the
42 said Douglas Smith, as aforesaid, including the aforesaid net taxable income of the said Emaroy Trust in the said sum of $12,794.97 was the sum of $121,255.95; that said income taxes in said amount were assessed against the said Douglas Smith and were by him involuntarily and under protest and duress, and to avoid threatened penalties and distraint of his property, paid to the defendant, the said Mabel G. Reinecke, the then Collector of Internal Revenue of the United States for the First Collection District of Illinois, at Chicago, Illinois, in installments as follows, that is to say, on March 14, 1925, $16,000.00; on May 13, 1925, $14,313.99; on June 12, 1925, $30,313.99; on September 14, 1925, $30,313.98; and on December 14, 1925, $30,313.99; that of the said income taxes for the year 1924 in the said sum of $121,255.95 so assessed against the said Douglas Smith and by him under protest and duress paid to the defendant, Mabel G. Reinecke, as aforesaid, the sum of $4,862.09 was assessed against him and by him involuntarily paid to the defendant,

as above set out, upon and by reason of the aforesaid not taxable income of the said Emaroy Trust for the period aforesaid in the said sum of $12,794.97, which was by him included in his said individual return of income for the year 1924, under protest and duress, as hereinabove set out;

10. That the Revenue Act of 1924 was enacted and became a law on June 2, 1924; that Section 219, paragraph (g), of that Act provided as follows:

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.";

11. That the said Douglas Smith never, directly or indirectly, received any of the aforesaid net income of the said Emaroy Trust in the said sum of $12,794.97 upon which he was required to and did pay income taxes to the defend-
43 ant in the said sum of $4,862.09, as aforesaid, other than as one of the three trustees of the said Trust; that throughout the period from January 1, 1924, to, to-wit, October 22, 1924, the said Douglas Smith alone had no power to revoke the said Emaroy Trust or to revest in himself title to any part of the corpus of said trust; but the said Emaroy Trust could be revoked by him and he could revest in himself title to the corpus of said trust only with the consent of one of the two other trustees thereof, namely, the said Kenneth G. Smith and Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company); that the said Emaroy Trust remained in existence unrevoked throughout the period from January 1, 1924, to, to-wit, October 22, 1924, as aforesaid, and immediately upon the receipt during said period of the same income of the said Emaroy Trust, or of any part thereof, said income forthwith belonged to and was received and retained by the said Emaroy Trust and the beneficiaries thereof in accordance with the terms of its trust indenture; that the income of the said Emaroy Trust was not the income of the said Douglas Smith, was never received by him, directly or indirectly, to his own use and benefit, and could not legally be taxed to him;

12. That during the said period from January 1, 1924 to, to-wit, October 22, 1924, and prior and subsequent thereto, and under the express provision made therefor in the trust indenture of said Emaroy Trust, the said Foreman-State

Trust and Savings Bank (formerly called Foreman Bros. Banking Company) was entitled to receive compensation from said trust as one of the trustees thereof, and upon becoming a trustee thereof, as aforesaid, and in all its acts as a trustee of said trust, said Foreman-State Trust and Savings Bank was a representative of and was acting for the beneficiaries of said Emaroy Trust; that the said Kenneth G. Smith, as one of the trustees of the said Emaroy Trust, was likewise during said period and prior and subse-
44 quent thereto entitled to compensation from said Emaroy Trust, and was a representative of and was acting for the said beneficiaries thereof; that in addition, the said Kenneth G. Smith in his individual capacity was otherwise a beneficiary of the said Emaroy Trust under the terms of its trust indenture; that at no time during the year 1924 did Douglas Smith, the grantor of said Emaroy Trust, have power to revest in himself title to any part of the corpus of said trust without the consent of a beneficiary thereof;

13. That the collection from the said Douglas Smith by the defendant, Mabel G. Reinecke, under protest and duress, of said income taxes for the calendar year 1924 in the said sum of $121,255.95, as aforesaid, to the extent of the said sum of $4,862.09, assessed and collected from the said Douglas Smith upon and by reason of the inclusion in his income tax return of the said net taxable income of the said Emaroy Trust in the said sum of $12,794.97, as above set out, was arbitrary, unauthorized, illegal and without warrant of law.

14. That on, to-wit, May 16, 1929, these plaintiffs as the Executors of the Last Will and Testament of Douglas Smith, Deceased, within the time prescribed therefor by law, filed with the then Collector of Internal Revenue for the First Collection District of Illinois, at Chicago, Illinois, their duly executed claim for refund of income taxes paid by Douglas Smith for the calendar year 1924 in the sum of $68,187.74, in and by which claim for refund plaintiffs claim the refund of said income taxes for the calendar year 1924 which had been illegally and forcibly collected from the said Douglas Smith in his lifetime, in the said sum of $4,862.09, by reason of the inclusion in his net taxable income for said year of the net taxable income of the said Emaroy Trust for the period from January 1, 1924 to, to-wit, October 22, 1924, in the said sum of $12,794.97 as hereinabove set out; that on, to-wit, November 29, 1929, said claim for refund was
45 disallowed in full by the Commissioner of Internal Revenue on a schedule dated the day and year last afore-

said, and plaintiffs were notified of said disallowance by the Commissioner of Internal Revenue by a letter dated, to-wit, November 29, 1929;

15. That by reason of the premises, the defendant, Mabel G. Reinecke, then and there became indebted to and obligated to pay to the said Douglas Smith the said sum of $4,862.09, of which the said Douglas Smith was then and there most wrongfully deprived by the defendant, in the manner and form set forth, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid; and being so indebted, in consideration thereof, the defendant herein then and there undertook and faithfully promised the said Douglas Smith to pay to him the said sum of $4,862.09, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid; that nevertheless the defendant, though often thereunto requested by the said Douglas Smith during his lifetime and thereafter by the plaintiffs as the duly qualified Executors of his Last Will and Testament, has not paid to the said Douglas Smith during his lifetime or to the plaintiffs or to either of them, since the death of the said Douglas Smith, the said sum of money or the interest thereon or any part thereof, but wholly refuses so to do, to the damage of the plaintiffs as such Executors, as aforesaid, in the sum of Four Thousand Eight Hundred Sixty-two and 9/100 ($4.862.09) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid.

Eighth Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if herein set out at length the first eleven (11) paragraphs, inclusive, of the Seventh Count hereof, and here now further aver and show:

2. That Section 219 of the Revenue Act of 1924, as
46 applied to the facts herein stated, in so far as said section required or requires or has or may be construed to require that the net taxable income of the Emaroy Trust for said period from January 1, 1924 to, to-wit, October 22, 1924, in the said sum of $12,794.97 be included in the net taxable income of the said Douglas Smith, the grantor of said trusts, for the calendar year 1924, and Sections 210 and 211 of the Revenue Act of 1924 in conjunction with the said Section 219 of said Act, as applied to the facts herein stated, in so far

as said sections required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the Emaroy Trust for the aforesaid period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $12,794.97, or on any part thereof, as being part of his income for the calendar year 1924 and hence taxable to him, personally, were and are ultra vires, unconstitutional, invalid and of no force and effect; that said Sections 210, 211 and 219 of the Revenue Act of 1924 in so far as the same required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the Emaroy Trust for the said period from January 1, 1924 to, to-wit, October 22, 1924 in the said sum of $12,794.97, or on any part thereof, as aforesaid, levied and levy a direct tax upon the said Douglas Smith which was not and is not apportioned among the several States according to their respective numbers and was not and is not laid in proportion to the census or enumeration as was and is required by Clause Third of Section 2 of Article I and by Clause Fourth of Section 9 of said Article I of the Constitution of the United States of America and said sections of the Revenue Act of 1924 in that respect are ultra vires and exceed the limitations placed upon the power and authority of Congress by said Clause Third of Section 2 and Clause Fourth of
47 Section 9 of Article I of said Constitution of the United States; that said Sections 210, 211 and 219 in so far as they required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the Emaroy Trust, as aforesaid, exceeded and exceed the power and authority conferred on Congress by the Sixteenth Amendment to the Constitution of the United States, and in imposing or levying a tax upon the said Douglas Smith for and upon the said net taxable income of the Emaroy Trust, as aforesaid, said sections deprived and deprive the said Douglas Smith of his property without due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States; that for these and other reasons said Sections 210, 211 and 219 of the Revenue Act of 1924, in so far as they required or require or have been or may be construed to require the payment of income taxes by the said Douglas Smith, as aforesaid, were and are, as

applied to the facts herein stated, ultra vires, unconstitutional, invalid and of no force and effect;

3. Plaintiffs here now incorporate in this count by reference thereto and repeat as if set out at length herein Paragraphs 13, 14 and 15 of said Seventh Count of this Declaration.

Ninth Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if herein set out at length the first three (3) paragraphs, inclusive, of the First Count hereof and here now further aver and show:

3. That on or about, to-wit, September 25, 1922, in the City of Chicago and State of Illinois, the said Douglas Smith, a resident of said City, and a citizen of the United States, by a trust indenture on that day and at the place aforesaid duly executed by him as grantor, and by himself, the said Kenneth G. Smith, and Foreman Bros. Banking Com-
48 pany, a corporation organized and existing under and by virtue of the laws of the State of Illinois (now Foreman-State Trust and Savings Bank), as trustees, established a trust known as the June Trust for the benefit of his daughter, June Keith Slater, hereinafter sometimes referred to as the beneficiary under said trust; that in and by said trust indenture the said Douglas Smith, Kenneth G. Smith and Foreman Bros. Banking Company were constituted the trustees of the trust thereby established; that at the time of the establishment of said trust and from thence continuously to and including October 23, 1924, Foreman Bros. Banking Company (later during said period known as The Foreman Trust and Savings Bank, now Foreman-State Trust and Savings Bank) was an Illinois corporation duly authorized to act as a trustee of said trust, and the said Douglas Smith and Kenneth G. Smith were each of them citizens of Illinois, of full age and lawfully qualified to act as trustees of said trust;

3. That in and by the said trust indenture establishing the June Trust, as above set out, the grantor, Douglas Smith, conveyed and assigned to the trustees thereof thirty (30) shares of the common capital stock of the Pepsodent Company, and Illinois corporation, and provided that the same should be held and managed by said trustees and that the income therefrom and from all other trust property should

be by them collected and reinvested and accumulated until said stock and all said accumulations and additions thereto amounted to the sum of $300,000.00 and thereafter said trustee should pay over the net income of said trust to the said June Keith Slater during her life; that in and by said trust instrument establishing the June Trust it was further provided that upon the death of the said June Keith Slater, said trust should thereupon terminate and the trust property be distributed as the said beneficiary should by will appoint, and that in default of such appointment, said trust property should be distributed to the surviving issue of
49 the said June Keith Slater, the income only from their share of said principal to be paid to such issue until they respectively reached the age of twenty-one years, and that in the event the said June Keith Slater died leaving no issue, then the said trust estate should be distributed to the Florence and the Kenneth Trusts, two other trusts established by the said Douglas Smith for the benefit respectively of his daughter, Florence Gifford Ellis, and his son, Kenneth G. Smith, at the same time that he established the said June Trust, as above set out, in equal shares;

4. That in said trust indenture establishing the said June Trust it was provided that in the case of the death of a trustee, the remaining trustees had the authority and duty to appoint a successor trustee, providing, however, that one trustee always should be a bank or trust company of the City of Chicago; that said trust indenture establishing the said June Trust contained a provision in the words as follows:

"Anything herein contained to the contrary notwithstanding, this trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors.";

5. That a true and correct copy of the said trust indenture containing the provisions of the said June Trust is attached hereto and marked Exhibit "B" and said copy of said trust indenture and the provisions therein contained are by this reference incorporated herein and made a part hereof as fully as if herein set out at length;

6. That under the terms of the said trust indentures establishing the said June Trust and the said Kenneth and Florence Trusts, the said Douglas Smith was not a beneficiary of said trusts, or any of them, either as to the principal or the income thereof; that the said Douglas Smith

had no control over said trusts or any of them except as one of the three trustees thereof; that except as one of said three trustees, he had no title to the principal of said trusts, or of any of them, and had no right to receive the same or dispose of it; that except as one of said three trustees
50 he was not entitled to the income of said trusts, or any part thereof, or entitled to receive the same or dispose of it, or any part thereof, and had no right, title or authority to receive, hold or dispose of the same or any part thereof except as directed by said trust indentures, respectively; that throughout the period of the existence of said trusts, the said Douglas Smith in fact never received, directly or indirectly, to his own use or for his own benefit, any of the income thereof, and never exercised any control over the same;

7. That the said June Trust and the said Kenneth and Florence Trusts continued to exist under the terms of their said trust indentures, respectively, in the manner above set out, from the date of the establishment of said trusts continuously until, to-wit, October 22, 1924, when the said trust instrument establishing the said June trust was modified by a separate writing, duly executed by the said Douglas Smith and the other two trustees of said trust, wherein and whereby the said Douglas Smith resigned as trustee of the said June Trust and wherein and whereby the remaining trustees appointed a third person therein named to succeed him as such trustee; that in and by said modification, the provision contained in said trust indenture establishing the said June Trust, as above set out, that the said trust might be revoked or modified by a writing signed by the said Douglas Smith and one of the other two trustees thereof, as above set out, was so altered that said trust was not thereafter revocable or subject to modification by the said Douglas Smith, either acting alone or in conjunction with any other person;

8. That during the period from January 1, 1924 to, to-wit, the 22d day of October of said year, being the date of the execution of the aforesaid modification of said trust indenture establishing the June Trust, as hereinabove set out, the net taxable income of the said June Trust amounted to
51 the sum of $7,725.32; that having theretofore on or about, to-wit, March 14, 1925, filed a tentative income tax return for the calendar year 1924, in which was set out an estimated income tax for said year in the sum of $64,000.00, which did not include any income tax upon or by reason of the said net taxable income of the said June Trust for said period,

or upon or by reason of any part thereof, the said Douglas Smith on or about, to-wit, May 14, 1925, filed with the defendant, Mabel G. Reinecke, the then Collector of Internal Revenue, at Chicago, Illinois, his individual income tax return for the said calendar year 1924, and included in his said individual income tax return, at Item 9 (b) therein, the aforesaid net taxable income of the said June Trust in the aforesaid sum of $7,725.32; that the said net taxable income of the said June Trust for said period in said amount was included by the said Douglas Smith in his said income tax return involuntarily and under protest and duress; that said protest was duly filed in writing by the said Douglas Smith with his said return;

9. That the income taxes due to the United States upon the net taxable income for the calendar year 1924, as set out in the said individual return of income so filed by the said Douglas Smith, as aforesaid, including the aforesaid net taxable income of the said June Trust in the said sum of $7,725.32 was the sum of $121,255.95; that said income taxes in said amount were assessed against the said Douglas Smith and were by him, involuntarily and under protest and duress, and to avoid threatened penalties and distraint of his property, paid to the defendant, the said Mabel G. Reinecke, the then Collector of Internal Revenue of the United States for the First Collection District of Illinois, at Chicago, Illinois, in installments as follows, that is to say, on March 14, 1925, $16,000.00; and May 13, 1925, $14,313.99; on June 12, 1925, $30,313.99; on September 14, 1925, $30,313.98; and on December 14, 1925, $30,313.99; that of the said income taxes for the year 1924 in the said sum of $121,255.95 so assessed
52 against the said Douglas Smith and by him under protest and duress paid to the defendant, Mabel G. Reinecke, as aforesaid, the sum of $2,935.63 was assessed against him and by him involuntarily paid to the defendant, as above set out, upon and by reason of the aforesaid net taxable income of the said June Trust for the period aforesaid in the said sum of $7,725.32, which was by him included in his said individual return of income for the year 1924, under protest and duress, as hereinabove set out;

10. That the Revenue Act of 1924 was enacted and became a law on June 2, 1924; that Section 219, paragraph (g), of that Act provided as follows:

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any per-

son not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.";

11. That the said Douglas Smith never directly or indirectly received any of the aforesaid net income of the said June Trust in the said sum of $7,725.32 upon which he was required to and did pay income taxes to the defendant in the said sum of $2,935.63, as aforesaid, other than as one of the three trustees of said trust; that throughout the period from January 1, 1924 to, to-wit, October 22, 1924, the said Douglas Smith alone had no power to revoke said June Trust or to revest in himself title to any part of the corpus of said trust, but the said June Trust could be revoked by him and he could revest in himself title to the corpus of said trust only with the consent of one of the other two trustees thereof, namely, the said Kenneth G. Smith and Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company); that the said June Trust remained in existence unrevoked throughout the period from January 1, 1924 to, to-wit, October 22, 1924, as aforesaid, and immediately upon the receipt during said period, of the said income of the said June Trust, or any part thereof, said
53 income forthwith belonged to and was received and retained by said June Trust and the beneficiaries thereof in accordance with the terms of its trust indenture; that the income of said June Trust was not the income of the said Douglas Smith, was never received by him, directly or indirectly, to his own use and benefit and could not legally be taxed to him;

12. That during the said period from January 1, 1924, to, to-wit, October 22, 1924, and prior and subsequent thereto, and under the express provision made therefor in the trust indenture of said June Trust, the said Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company) was entitled to receive compensation from said trust as one of the trustees thereof, and upon becoming a trustee thereof, as aforesaid, and in all its acts as a trustee of said trust, said Foreman-State Trust and Savings Bank was a representative of and was acting for the beneficiaries of said June Trust; that the said Kenneth G. Smith, as one of the trustees of the said June Trust, was likewise during said period and prior and subsequent thereto entitled to compensation from said June Trust, and was a representative of

and was acting for the said beneficiaries thereof; that in addition, the said Kenneth G. Smith in his individual capacity was otherwise a beneficiary of the said June Trust under the terms of its trust indenture; that plaintiffs therefore aver that at no time during the year 1924 did Douglas Smith, the grantor of said June Trust, have power to revest in himself title to any part of the corpus of said trust without the consent of a beneficiary thereof;

13. That the collection from the said Douglas Smith by the defendant, Mabel G. Reinecke, under protest and duress, of said income taxes, for the calendar year 1924 in the said sum of $121,255.95, as aforesaid, to the extent of the said sum of $2,935.63, assessed and collected from the said Douglas Smith upon and by reason of the inclusion in his in-
54 come tax return of the said net taxable income of the said June Trust in the said sum of $7,725.32, as above set out, was arbitrary, unauthorized, illegal and without warrant of law;

14. That on, to-wit, May 16, 1929, those plaintiffs as the Executors of the Last Will and Testament of Douglas Smith, Deceased, within the time prescribed therefor by law, filed with the then Collector of Internal Revenue for the First Collection District of Illinois, at Chicago, Illinois, their duly executed claim for refund of income taxes paid by Douglas Smith for the calendar year 1924 in the sum of $68,187.74, in and by which claim for refund plaintiffs claim the refund of said income taxes for the calendar year 1924 which had been illegally and forcibly collected from the said Douglas Smith in his lifetime, in the said sum of $2,935.63, by reason of the inclusion in his net taxable income for said year of the net taxable income of the said June Trust for the period from January 1, 1924 to, to-wit, October 22, 1924, in the said sum of $7,725.32, as hereinabove set out; that on, to-wit, November 29, 1929, said claim for refund was disallowed in full by the Commissioner of Internal Revenue on a schedule dated the day and year last aforesaid, and plaintiffs were notified of said disallowance by the Commissioner of Internal Revenue by a letter dated, to-wit, November 29, 1929;

15. That by reason of the premises, the defendant, Mabel G. Reinecke, then and there became indebted to and obligated to pay to the said Douglas Smith the said sum of $2,935.63, of which the said Douglas Smith was then and

there most wrongfully deprived by the defendant, in the manner and form set forth, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid, and being so indebted, in consideration thereof, the defendant herein then and there undertook and faithfully promised the said Douglas Smith to pay to him the said sum of $2,935.63, together with interest
55 thereon at the rate of six per cent (6%) per annum from the date said taxes were paid; that nevertheless the defendant, though often thereunto requested by the said Douglas Smith during his lifetime and thereafter by the plaintiff's as the duly qualified Executors of his Last Will and Testament has not paid to the said Douglas Smith during his lifetime or to the plaintiffs or to either of them, since the death of the said Douglas Smith, the said sum of money or the interest thereon or any part thereof, but wholly refuses so to do, to the damage of the plaintiffs as such Executors, as aforesaid, in the sum of Two Thousand Nine Hundred Thirty-five and 63/100 ($2,935.63) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid.

Tenth Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if herein set out at length the first eleven paragraphs, inclusive, of the Ninth Count hereof, and here now further aver and show:

2. That Section 219 of the Revenue Act of 1924, as applied to the facts herein stated, in so far as said section required or requires or has or may be construed to require that the net taxable income of the June Trust for said period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $7,725.32 be included in the net taxable income of the said Douglas Smith, the grantor of said trusts, for the calendar year 1924, and Sections 210 and 211 of the Revenue Act of 1924 in conjunction with the said Section 219 of said Act, as applied to the facts herein stated, in so far as said Sections required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the June Trust for the aforesaid period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $7,725.32, or

on any part thereof, as being part of his income for the
56 calendar year 1924 and hence taxable to him, personally, were and are ultra vires, unconstitutional, invalid and of no force and effect; that said Sections 210, 211 and 219 of the Revenue Act of 1924 in so far as the same required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the June Trust for the said period from January 1, 1924, to, to-wit, October 22, 1924 in the said sum of $7,725.32, or on any part thereof, as aforesaid, levied and levy a direct tax upon the said Douglas Smith which was not and is not apportioned among the several States according to their respective numbers and was not and is not laid in proportion to the census or enumeration as was and is required by Clause Third of Section 2 of Article I and by Clause Fourth of Section 9 of said Article I of the Constitution of the United States of America and said sections of the Revenue Act of 1924 in that respect are ultra vires and exceed the limitations placed upon the power and authority of Congress by said Clause Third of Section 2 and Clause Fourth of Section 9 of Article I of said Constitution of the United States; that said Sections 210, 211 and 219 in so far as they required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the June Trust, as aforesaid, exceeded and exceed the power and authority conferred on Congress by the Sixteenth Amendment to the Constitution of the United States, and in imposing or levying a tax upon the said Douglas Smith for and upon the said net taxable income of the June Trust, as aforesaid, said sections deprived and deprive the said Douglas Smith of his property without due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States; that for these and other reasons said Sections 210, 211, and 219 of the
Revenue Act of 1924, in so far as they required or re-
57 quire or have been or may be construed to require the payment of income taxes by the said Douglas Smith, as aforesaid, were and are, as applied to the facts herein stated, ultra vires, unconstitutional, invalid and of no force and effect;

3. Plaintiffs here now incorporate in this count by reference thereto and repeat as if set out at length herein Paragraphs 13, 14 and 15 of said Ninth Count of this Declaration.

Eleventh Count.

1. Plaintiffs here now incorporate in this Count by reference thereto and repeat as if herein set out at length the first three (3) paragraphs, inclusive, of the First Count hereof and here now further aver and show;

2. That on or about, to-wit, September 25, 1922, in the City of Chicago and State of Illinois, the said Douglas Smith, a resident of said City, and a citizen of the United States, by a trust indenture on that day and at the place aforesaid duly executed by him as grantor, and by himself, the said Kenneth G. Smith, and Foreman Bros. Banking Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois (now Foreman-State Trust and Savings Bank), as trustees, established a trust known as the Florence Trust for the benefit of his daughter, Florence Gifford Ellis, hereinafter sometimes referred to as the beneficiary under said trust; that in and by said trust indenture the said Douglas Smith, Kenneth G. Smith and Foreman Bros. Banking Company were constituted the trustees of the trust thereby established; that at the time of the establishment of said trust and from thence continuously to and including October 22, 1924, Foreman Bros. Banking Company (later during said period known as The Foreman Trust and Savings Bank, now Foreman-State Trust and Savings Bank) was an Illinois corporation duly authorized to act as a trustee of said trust, and the said Douglas Smith and Kenneth G. Smith were each of them citizens of Illinois,
58 of full age and lawfully qualified to act as trustees of said trust;

3. That in and by the said trust indenture establishing the Florence Trust, as above set out, the grantor, Douglas Smith, conveyed and assigned to the trustees thereof thirty (30) shares of the common capital stock of the Pepsodent Company, an Illinois corporation, and provided that the same should be held and managed by said trustees and that the income therefrom and from all other trust property should be by them collected and reinvested and accumulated until said stock and all said accumulations and additions thereto amounted to the sum of $300,000.00 and thereafter said trustees should pay over the net income of said trust to the said Florence Gifford Ellis during her life; that in and by said trust instrument it was further provided that upon the death of the said Florence Gifford Ellis, said trust should there-

upon terminate and the trust property be distributed as the said beneficiary should by will appoint, and that in default of such appointment, said trust property should be distributed to the surviving issue of the said Florence Gifford Ellis, the income only from their share of said principal to be paid to such issue until they respectively reached the age of twenty-one years, and that in the event the said Florence Gifford Ellis died leaving no issue, then the said trust estate was to be distributed to the June and Kenneth Trusts, two other trusts established by the said Douglas Smith for the benefit respectively of his daughter, June Keither Slater, and his son, Kenneth G. Smith, at the same time that he established the said Florence Trust, as above set out, in equal shares;

4. That in said trust indenture establishing the said Florence Trust it was provided that in the case of the death of a trustee, the remaining trustees had the authority and duty to appoint a successor trustee, providing, however, that one trustee always should be a bank or trust company of the City of Chicago; that said trust indenture establishing the said Florence Trust contained a provision in the words as follows:

59 "Anything herein contained to the contrary notwithstanding, this trust may be modified or revoked at any time by any instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors;"

5. That a true and correct copy of the said trust indenture containing the provisions of the said Florence Trust is attached hereto and marked Exhibit "C" and said copy of said trust indenture and the provisions therein contained are by this reference incorporated herein and made a part hereof as fully as if herein set out at length;

6. That under the terms of the said trust indentures establishing the said Florence Trust and the said Kenneth and June Trusts, the said Douglas Smith was not a beneficiary of said trusts, or any of them, either as to the principal or the income thereof; that the said Douglas Smith had no control over said trusts or any of them except as one of the three trustees thereof; that except as one of said three trustees, he had no title to the principal of said trusts, or of any of them, and had no right to receive the same or dispose of it; that except as one of said three trustees he was not entitled to the income of said trusts, or any part thereof, or entitled to receive the same or dispose of it, or any part thereof, or entitled to receive the same or dispose of it, or any part thereof,

and had no right, title or authority to receive, hold or dispose of the same or any part thereof except as directed by said trust indentures, respectively; that throughout the period of the existence of said trusts, the said Douglas Smith in fact never received, directly or indirectly, to his own use and benefit, any of the income thereof, and never exercised any control over the same;

7. That the said Florence Trust and the said Kenneth and June Trusts continued to exist under the terms of their said trust indentures, respectively, in the manner above set out, from the date of the establishment of said trusts continuously until, to-wit, October 22, 1924, when the said trust instrument establishing the said Florence Trust was
60 modified by a separate writing, duly executed by the said Douglas Smith and the other two trustees of said trust, wherein and whereby the said Douglas Smith resigned as trustee of the said Florence Trust and wherein and whereby the remaining trustees appointed a third person therein named to succeed him as such trustee; that in and by said modification, the provision contained in said trust indenture establishing the said Florence Trust that the said trust might be revoked or modified by a writing signed by the said Douglas Smith and one of the other two trustees thereof, as above set out, was so altered that said trust was not thereafter revocable or subject to modification by the said Douglas Smith, either acting alone or in conjunction with any other person;

8. That during the period from January 1, 1924, to, to-wit, the 22nd day of October of said year, being the date of the execution of the aforesaid modification of said trust indenture establishing the Florence Trust, as hereinabove set out, the net taxable income of the said Florence Trust amounted to the sum of $7,725.32; that having theretofore on or about, to-wit, March 14, 1925, filed a tentative income tax return for the calendar year 1924, in which was set out an estimated income tax for said year in the sum of $64,000.00, which did not include any income tax upon or by reason of the said net taxable income of the said Florence Trust for said period, or upon or by reason of any part thereof, the said Douglas Smith on or about, to-wit, Mary 14, 1925, filed with the defendant, Mabel G. Reinecke, the then Collector of Internal Revenue, at Chicago, Illinois, his individual income tax return for the said calendar year 1924, and included in his said individual income tax return, at Item 9 (b) therein, the aforesaid net taxable income of the said

Florence Trust in the aforesaid sum of $7,725.32; that the said net taxable income of the said Florence Trust for said period in said amount was included by the said Douglas Smith in his said income tax return involuntarily and under protest and duress; that the said protest was duly filed in writing by the said Douglas Smith with his said re-
61 turn;

9. That the income taxes due to the United States upon the net taxable income for the calendar year 1924, as set out in the said individual return of income so filed by the said Douglas Smith, as aforesaid, including the aforesaid net taxable income of the said Florence Trust in the said sum of $7,725.32, was the sum of $121,255.95; that said income taxes in said amount were assessed against the said Douglas Smith and were by him, under protest and duress, and to avoid threatened penalties and distraint of his property, paid to the defendant, the said Mabel G. Reinecke, the then Collector of Internal Revenue of the United States for the First Collection District of Illinois, at Chicago, Illinois, in installments as follows, that is to say, on March 14, 1925, $16,000; on May 13, 1925, $14,313.99; on June 12, 1925, $30,-313.99; on September 14, 1925, $30,313.98; and on December 14, 1925, $30,313.99; that of the said income taxes for the year 1924 in the said sum of $121,255.95 so assessed against the said Douglas Smith and by him under protest and duress paid to the defendant, Mabel G. Reinecke, as aforesaid, the sum of $2,935.63 was assessed against him and by him involuntarily paid to the defendant, upon and by reason of the aforesaid net taxable income of the said Florence Trust for the period aforesaid in the said sum of $7,725.32, which was by him included in his said individual return of income for the year 1924, under protest and duress, as hereinabove set out;

10. That the Revenue Act of 1924 was enacted and became a law on June 2, 1924; that Section 219, paragraph (g), of that Act provided as follows:

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor;"

11. That the said Douglas Smith never directly or in-

directly received any of the aforesaid net income of the
62 said Florence Trust in the said sum of $7,725.32 upon
which he was required to and did pay income taxes to the defendant in the said sum of $2,935.63, as aforesaid, other than as one of the three trustees of said trust; that throughout the period from January 1, 1924, to, to-wit, October 22, 1924, the said Douglas Smith alone had no power to revoke said Florence Trust or to revest in himself title to any part of the corpus of said trust, but the said Florence Trust could be revoked by him and he could revest in himself title to the corpus of said trust only with the consent of one of the other two trustees thereof, namely, the said Kenneth G. Smith and Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company); that the said Florence Trust remained in existence unrevoked throughout the period from January 1, 1924, to, to-wit, October 22, 1924, as aforesaid, and immediately upon the receipt during said period, of the said income of the said Florence Trust, or any part thereof, said income forthwith belonged to and was received and retained by said Florence Trust and the beneficiaries thereof in accordance with the terms of its trust indenture; that the income of said Florence Trust was not the income of the said Douglas Smith, was never received by him, directly or indirectly, to his own use and benefit and could not legally be taxed to him;

12. That during the said period from January 1, 1924, to, to-wit, October 22, 1924, and prior and subsequent thereto, and under the express provision made therefor in the trust indenture of said Florence Trust, the said Foreman-State Trust and Savings Bank (formerly called Foreman Bros. Banking Company) was entitled to receive compensation from said trust as one of the trustees thereof, and upon becoming a trustee thereof, as aforesaid, and in all its acts as a trustee of said trust, said The Foreman Trust and Savings Bank was a representative of and was acting for the
beneficiaries of said Florence Trust; that said Kenneth
63 G. Smith, as one of the trustees of the said Florence
Trust, was likewise during said period and prior and subsequent thereto entitled to compensation from said Florence Trust, and was a representative of and was acting for the said beneficiaries thereof; that in addition, the said Kenneth G. Smith in his individual capacity was otherwise a beneficiary of the said Florence Trust under the terms of its trust indenture; that at no time during the year 1924 did

Douglas Smith, the grantor of said Florence Trust, have power to revest in himself title to any part of the corpus of said trust without the consent of a beneficiary thereof;

13. That for the reasons above stated, the collection from the said Douglas Smith by the defendant, Mabel G. Reinecke, under protest and duress, of said income taxes, for the calendar year 1924 in the said sum of $121,255.95, as aforesaid, to the extent of the said sum of $2,935.63, assessed and collected from the said Douglas Smith by reason of the inclusion in his income tax return of the said net taxable income of the said Florence Trust in the said sum of $7,725.32, as above set out, was arbitrary, unauthorized, illegal and without warrant of law;

14. That on, to-wit, May 16, 1929, these plaintiffs as the Executors of the Last Will and Testament of Douglas Smith, deceased, within the time prescribed therefor by law, filed with the then Collector of Internal Revenue for the First Collection District of Illinois, at Chicago, Illinois, their duly executed claim for refund of income taxes paid by Douglas Smith for the calendar year 1924 in the sum of $68,187.74, in and by which claim for refund plaintiffs claim the refund of said income taxes for the calendar year 1924 which had been illegally and forcibly collected from the said Douglas Smith in his lifetime, in the said sum of $2,935.63, by reason of the inclusion in his net taxable income for said year of the net taxable income of the said Florence Trust for the period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $7,725.32, as hereinabove set out; that
64 on, to-wit, November 29, 1929, said claim for refund was disallowed in full by the Commissioner of Internal Revenue on a schedule dated the day and year last aforesaid, and plaintiffs were notified of said disallowance by the Commissioner of Internal Revenue by a letter dated, to-wit, November 29, 1929;

15. That by reason of the premises, the defendant, Mabel G. Reinecke, then and there became indebted to and obligated to pay to the said Douglas Smith the said sum of $2,935.63, of which the said Douglas Smith was then and there most wrongfully deprived by the defendant, in the manner and form set forth, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid; and being so indebted, in consideration thereof, the defendant herein then and there undertook and faithfully promised the said Douglas Smith to pay to him the said

sum of $2,935.63, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid; that nevertheless the defendant, though often thereunto requested by the said Douglas Smith during his lifetime and thereafter by the plaintiffs as the duly qualified Executors of his Last Will and Testament has not paid to the said Douglas Smith during his lifetime or to the plaintiffs or to either of them since the death of the said Douglas Smith, the said sum of money or the interest thereon or any part thereof, but wholly refuses so to do, to the damage of the plaintiffs as such Executors, as aforesaid, in the sum of Two Thousand Nine Hundred Thirty-five and 63/100 ($2,935.63) Dollars, together with interest thereon at the rate of six per cent (6%) per annum from the date said taxes were paid.

Twelfth Count.

1. Plaintiffs here now incorporate in this count by reference thereto and repeat as if herein set out at length the first eleven (11) paragraphs, inclusive, of the Eleventh Count hereof and here now further aver and show:

2. That Section 219 of the Revenue Act of 1924, as
65 applied to the facts herein stated, in so far as said section required or requires or has or may be construed to require that the net taxable income of the Florence Trust for said period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $7,725.32 be included in the net taxable income of the said Douglas Smith, the grantor of said trusts, for the calendar year 1924, and Sections 210 and 211 of the Revenue Act of 1924 in conjunction with the said Section 219 of said Act, as applied to the facts herein stated, in so far as said sections required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the Florence Trust for the aforesaid period from January 1, 1924, to, to-wit, October 22, 1924, in the said sum of $7,725.32, or on any part thereof, as being part of his income for the calendar year 1924 and hence taxable to him personally, were and are ultra vires, unconstitutional, invalid and of no force and effect; that said Sections 210, 211 and 219 of the Revenue Act of 1924 in so far as the same required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the

United States upon the said net taxable income of the Florence Trust for the said period from January 1, 1924, to, to-wit, October 22, 1924 in the said sum of $7,725.32, or on any part thereof, as aforesaid, levied and levy a direct tax upon the said Douglas Smith which was not and is not apportioned among the several States according to their respective numbers and was not and is not laid in proportion to the census or enumeration as was and is required by Clause Third of Section 2 of Article I and by Clause Fourth of Section 9 of said Article I of the Constitution of the United States of America and said sections of the Revenue Act of 1924 in that respect are ultra vires and exceed the limitations placed upon the power and authority of Congress by said Clause
66 Third of Section 2 and Clause Fourth of Section 9 of Article I of said Constitution of the United States; that said Sections 210, 211 and 219 in so far as they required or require or have been or may be construed to require that the said Douglas Smith pay income taxes to the United States upon the said net taxable income of the Florence Trust, as aforesaid, exceeded and exceed the power and authority conferred on Congress by the Sixteenth Amendment to the Constitution of the United States, and in imposing or levying a tax upon the said Douglas Smith for and upon the said net taxable income of the Florence Trust, as aforesaid, said sections deprived and deprive the said Douglas Smith of his property without due process of law in violation of the provisions of the Fifth Amendment to the Constitution of the United States; that for these and other reasons said Secions 210, 211 and 219 of the Revenue Act of 1924, in so far as they required or require or have been or may be construed to require the payment of income taxes by the said Douglas Smith, as aforesaid, were and are, as applied to the facts herein stated, ultra vires, unconstitutional, invalid and of no force and effect;

3. Plaintiffs here now incorporate in this count by reference thereto and repeat as if set out at length herein Paragraphs 13, 14 and 15 of said Eleventh Count of this Declaration;

All to the damage of plaintiffs as they say of One Hundred Twenty-five Thousand ($125,000) Dollars.

Wherefore, plaintiffs bring their suit.

(Signed) Hopkins, Starr & Hopkins
(Signed) Burry, Johnstone, Peters & Dixon
Attorneys for Plaintiffs.

67 EXHIBIT "A"

Emaroy Trust

This Agreement, made this 26th day of September 1922 between Douglas Smith of Chicago (hereinafter sometimes called the Grantor), and Foreman Bros. Banking Co. of Chicago, Douglas Smith and Kenneth G. Smith of Chicago, as Trustees,

Witnesseth That:

It is the desire and intent of the Grantor during his own lifetime to make provision for his wife, Emaroy J. Smith, in order that she may me assured of support and maintenance in a manner in keeping with the present circumstances of the Grantor, and to that end to place certain property in trust for her benefit and to add thereto until a definite amount has been reached.

Now Therefore the said Grantor for and in consideration of love and affection and other good and valuable considerations and in consideration of the execution and performance of the Trusts hereinafter declared, has assigned, transferred and delivered, and by these presents does assign, transfer and deliver unto Foreman Bros. Banking Co., Douglas Smith and Kenneth G Smith as Trustees, and to their successors and assigns in said Trust, the following securities, to-wit:

Fifty (50) shares of the common capital stock of the Pepsodent Company, a corporation of Illinois.

Said Fifty shares of stock together with all income therefrom and all cash, securities or other property that may be hereafter added thereto are to be held by said Trustees in a trust to be known as the Emaroy Trust for and upon the following uses, purposes and conditions:

1. Said Trustee are directed to collect the income and invest and reinvest the same from time to time until the aggregate value thereof together with all accumulations and
68 additions thereto amounts, in the opinion of a majority of the Trustees, to the sum of Five Hundred Thousand Dollars ($500,000).

2. When the value of the property so accumulated in the Emaroy Trust has reached said amount of Five Hundred Thousand Dollars ($500,000) the net income therefrom, from that time forward, shall be paid in equal monthly installments to or for the account of said Emaroy J. Smith.

3. Upon the death of said Emaroy J. Smith, accumulation shall cease, and the principal of this trust shall go as said Emaroy J. Smith may by last will in writing appoint, and failing appointment, said principal shall be divided equally between three trusts created by instruments of even date herewith for the benefit of Grantor's children, said trusts being known respectively as the Florence Trust, the June Trust and the Kenneth Trust.

4. All stock certificates, bonds and other securities and all evidences of title of trust property shall be deposited and remain with said Trustee, the Foreman Bros. Banking Co.

5. Said Trustees shall hold, manage and control the said Trust Estate and shall have full power to sell, assign, pledge, mortgage, transfer and deliver any or all of the properties and securities held by them as Trustees at such prices and upon such terms as in their discretion they may deem for the best interests of the Estate. They are given full power and authority to invest and reinvest in such securities and in such manner as in their judgment is wise. Said Trustees are given as wide a latitude in the making of investments and as full power over the assets committed to their charge as if they were in fact the sole legal and equitable owner thereof. Save with the written approval of Douglas Smith, however, no sale shall be made of said Pepsodent stock by said Trustees for a period of fifteen years from the date of this instrument. In the event of Douglas Smith's death no such
69 sale shall be made for five years thereafter without the written approval of Kenneth Smith.

6. Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith, and either one of the other two trustees or their successors.

7. Said Trustee shall collect the income, and after paying all necessary expenses, including a reasonable compensation to the Trustees and reimbursement of all expenses incurred in the administration of the Trust, including counsel fees when necessary, shall make disbursement in the manner herinabove directed.

8. Payments shall be made only upon the personal receipt of the beneficiaries or their guardians. Any adult beneficiary of sound mind, however, may in writing appoint an agent to receive income which has become due. Such appointment shall not be valid for more than one year. No beneficiary shall have any right or authority to assign or anticipate any

income or allowance or any disbursement of any part of the principal which he might be entitled to receive, under any of the provisions of said Trust, and no interest of the beneficiaries either in principal or income shall be alienable in any manner or to any extent for the obligations or liabilities, voluntary or involuntary, of such beneficiaries or for any claims against them or any of them of whatsoever character.

9. If and when the Trustee are required to make any division or a distribution said Trustees are authorized to make such division or distribution of any securities, property or cash as they may see fit, and for that purpose the value which said Trustees may place on the respective securities and properties shall be final and binding.

10. It shall not be the duty of the purchaser of any trust property to see to the application of the purchase money paid therefor nor shall any one who may deal with said Trustees be privileged or required to inquire into the necessity or expediency of any act of said Trustees or of the provisions of this instrument.

11. All taxes of whatsoever nature which are legally imposed upon or assessed against this trust or the income thereof or against any beneficiary on account of said trust or the receipt of income therefrom, shall in each case be paid by the Trustees out of the income of this trust.

12. The Trustees shall have full power and authority to vote in any manner by them or a majority of them deemed proper any stock held as Trustees or in their discretion may vote such stock by proxy and are hereby duly authorized to execute and deliver any proxies for stock of any corporation held in trust hereunder. In voting such stock the Trustees shall have full discretion and power as though they were the holders of the same in their own right.

13. The Trustees shall have full power and authority to avail themselves in their discretion of any bond or stock subscription privileges which may at any time accrue to them as the holders or owners of any securities of any corporation.

14. The Trustees in their discretion are hereby authorized to unite with other owners of property or securities similar to any held by them in trust hereunder in carrying out any plan for reorganization of any corporation or company whose securities form part of any of the trust estate; to exchange the securities of any corporation for others issued by the same or by any other corporation upon such terms as the Trustees shall deem proper; to assent to the consoli-

dation or merger of any corporation whose securities are held by them with any other corporation; to the lease by such corporation of its property or any portion thereof to any other corporation, or to the lease by any other corporation of its property to such corporation; and upon any such consolidation, merger, lease or similar arrangement to exchange
71 the securities held hereunder for other securities, pursuant to such arrangement; and to pay all such assessments, expenses, and sums of money as they may deem expedient for the protection of the interests of the Trust estate in stocks, bonds, or other securities, and generally to exercise with respect to all securities held by them all the same rights and powers as may be lawfully exercised by individual persons owning similar property in their own right.

15. The Trustees shall have the power to determine according to their own judgment what is and what is not net income from this trust, and what is and what is not principal, and their decision in that respect shall be final and binding.

16. In case of the refusal or inability of any trustee to perform any duty under the Trusts hereby provided, the Trusteeship shall thereby be vacated as to such Trustee and in such case or in case of the death or resignation of any trustee the remaining trustees shall have authority, and it shall be their duty, to appoint another trustee to fill the vacancy so caused that that at all times there may be three competent trustees. One of said Trustees, however, must always be a bank or trust company of the city of Chicago. If two vacancies occur at the same time, the surviving trustee may appoint two successor trustees. The appointment of new trustees aind their acceptance shall be in writing.

In Witness Whereof the parties hereto have executed this agreement the day and year first above written.

Executed in triplicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer
KENNET G. SMITH (Seal)
DOUGLAS SMITH (Seal)
As Trustees.

Attest:
JAMES A. HENNING
(Seal) *Secretary.*

72 MODIFICATION OF EMAROY TRUST.

November 4th 1922

This Instrument, executed this 4th day of November 1922 by Douglas Smith of Chicago (hereinafter sometimes called the Grantor) and Foreman Bros. Banking Co. of Chicago, as Trustee,

Witnesseth That

Whereas, by instrument dated September 25, 1922, the Grantor established a trust for the benefit of his wife, Emaroy J. Smith, known as the Emaroy Trust, under which Foreman Bros. Banking Co. of Chicago is one of the Trustees. Said trust agreement contains the following provision which appears as paragraph six thereof:

"Anything herein contained to the contrary notwithstanding, this trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors."

Pursuant to the above power and in accordance therewith said Emaroy Trust agreement is hereby modified in the following particulars:

1. By striking out paragraph 11 thereof.
2. By adding as paragraph 2-a thereof the following:

2-a. It is the intent of Grantor and is so understood by his said wife that said Emaroy Trust Fund of Five Hundred Thousand Dollars ($500,000) shall represent his said wife's share in his estate and shall be in lieu of her dower and statutory interest therein. Should said Emaroy J. Smith survive Grantor and should she elect to renounce his last will and testament, then upon such renunciation this Emaroy Trust shall at once terminate and the entire Trust Fund shall thereupon be delivered over to Grantor's executors and become part of Grantor's estate."

Executed in triplicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer
As Trustee under the Emaroy Trust.

73 EXHIBIT "B"

June Trust

This Agreement, made this 25th day of September 1922 between Douglas Smith of Chicago (hereinafter sometimes called the Grantor), and Foreman Bros. Banking Co. of Chicago, Douglas Smith and Kenneth G. Smith of Chicago, as Trustees,

Witnesseth That:

It is the desire and intent of the Grantor to settle, assign, transfer and deliver certain securities of which he is now the owner and which are hereafter described, for the uses and purposes and upon the conditions hereafter set forth:

Now Therefore the said Grantor for and in consideration of love and affection and other good and valuable considerations and in consideration of the execution and performance of the Trusts hereinafter declared, has assigned, transferred and delivered, and by these presents does assign, transfer and deliver unto Foreman Bros. Banking Co., Douglas Smith and Kenneth G. Smith as Trustees, and to their successors and assigns in said Trust, the following securities, to-wit:

Thirty (30) shares of the common capital stock of the Pepsodent Company, a corporation of Illinois.

Said thirty shares of stock together with all income therefrom and all cash, securities or other property that may hereafter be added thereto are to be held by said Trustees in a trust known as the June Trust for and upon the following uses, purposes and conditions:

1. Said Trustees are directed to collect the income and invest and reinvest the same from time to time until the value thereof together with all accumulations and additions thereto amounts, in the opinion of a majority of the Trustees, to
74 the sum of Three Hundred Thousand Dollars ($300-000).

2. When the property so accumulated in the June Trust has reached said amount of Three Hundred Thousand Dollars ($300,000) the net income therefrom, from that time forward, shall be paid in equal monthly installments to or for the account of June Keith Slater, the daught of the Grantor, during her life.

3. Upon the death of said June Keith Slater, accumula-

tion shall cease and the principal of this Trust shall go as said beneficiary may by last will in writing appoint, and failing appointment, shall be disposed of by said Trustee as follows:

a. If said June Keith Slater dies leaving issue, the principal of said June Trust shall become the property of such issue in equal shares, the income therefrom to be paid in equal parts to said issue until they respectively reach the age of Twenty-one (21) years and as and when they respectively reach said age that part of the principal from which said issue have been so receiving income shall be delivered over to them respectively as their absolute property.

b. If she dies leaving no issue, the principal of the Trust shall go to increase equally two trusts created by instruments of even date herewith for the benefit of her brother and sister,—being known as the Florence Trust and the other as the Kenneth Trust.

4. All stock certificates, bonds and other securities and all evidence of title of trust property shall be deposited and remain with said Trustee, the Foreman Bros. Banking Co.

5. Said Trustees shall hold, manage and control the said Trust Estate and shall have full power to sell, assign, pledge, mortgage, transfer and deliver any or all of the properties and securities held by them as Trustees at such prices and upon such terms as in their discretion they may deem for the best interests of the Estate. They are given full power and authority to invest and reinvest in such securities and in such manner as in their judgment is wise. Said Trustee sare given as wide a latitude in the making of investments and as full power over the assets committed to their charge as if they were in fact the sole legal and equitable owners thereof. Save with the written approval of Douglas Smith, however, no sale shall be made of said Pepsodent stock by said Trustees for a period of fifteen years from the date of this instrument. In the event of Douglas Smith's death no such sale shall be made for five years thereafter without the written approval of Kenneth G. Smith.

6. Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith, and either one of the other two trustees or their successors.

7. Said Trustees shall collect the income, and after paying all necessary expenses, including a reasonable compensation to the Trustees and reimbursement of all expenses

incurred in the administration of the Trust, including counsel fees when necessary, shall make disbursement in the manner hereinabove directed.

8. Payments shall be made only upon the personal receipt of the beneficiaries or their guardians. Any adult beneficiary of sound mind, however, may in writing appoint an agent to receive income which shas become due. Such appointment shall not be vaild for more than one year. No
76 beneficiary shall have any right or authority to assign or anticipate any income or allowance or any disbursement of any part of the principal which he might be entitled to receive, under any of the provisions of said Trust, and no interest of the beneficiaries either in principal or income shall be alienable in any manner or to any extent for the obligations or liabilities, voluntary or involuntary, of such beneficiaries or for any claims against them or any of them of whatsoever character.

9. If and when the Trustees are required to make any division or distribution said Trustees are authorized to make such division or distribution of any securities, property or cash as they may see fit, and for that purpose the value which said Trustees may place on the respective securities and properties shall be final and binding.

10 It shall not be the duty of the purchaser of any trust property to see to the application of the purchase money paid therefor nor shall any one who may deal with said Trustee be privileged or required to inquire into the necessity or expediency of any act of said Trustees or of the provisions of this instrument.

11. All taxes of whatsoever nature which are legally imposed upon or assessed against this trust or the income thereof or against any beneficiary on account of said trust or the receipt of income therefrom, shall in each case be paid by the Trustees out of the income of this trust.

12. The Trustees shall have full power and authority to vote in any manner by them or a majority of them deemed proper any stock held as Trustees or in their discretion may vote such stock by proxy and are hereby duly authorized to execute and deliver any proxies for stock of any corpo-
77 ration held in trust hereunder. In voting such stock the Trustees shall have full discretion and power as though they were the holders of the same in their own right.

13. The Trustees shall have full power and authority to avail themselves in their discretion of any bond or stock subscription privileges which may at any time accrue to them as the holders or owners of any securities of any corporation.

14. The Trustees in their discetion are hereby authorized to unite with other owners of property or securities similar to any held by them in trust hereunder in carrying out the plan for reorganization of any corporation or company whose securities form part of any of the trust estate; to exchange the securities of any corporation for others issued by the same or by any other corporation upon such terms as the Trustees shall deem proper; to assent to the consolidation or merger of any corporation whose securities are held by them with any other corporation; to the lease by such corporation of its property or any portion thereof to any other corporation, or to the lease by any other corporation of its property to such corporation; and upon any such consolidation, merger, lease or similar arrangement to exchange the securities held hereunder for other securities, pursuant to such arrangement and to pay all such assessments, expenses, and sums of money as they may deem expedient for the protection of the interests of the Trust estate in stocks, bonds, or other securities, and generally to exercise with respect to all securities held by them all the same rights and powers as may be lawfully exercised by individual persons owning similar property in their own right.

15. The Trustees shall have the power to determine ac-
78 cording to their own judgment what is and what is not net income from this trust, and what is and what is not principal, and their decision in that respect shall be final and binding.

16. In case of the refusal or inability of any trustee to perform any duty under the Trusts hereby provided, the Trusteeship shall thereby be vacated as to such trustee and in such case or in case of the death or resignation of any trustee the remaining trustees shall have authority, and it shall be their duty, to appoint another trustee to fill the vacancy so caused so that at all times there may be three competent trustees. On of said Trustees, however, must always be a bank or trust company of the city of Chicago. If two vacancies occur at the same time, the surviving trustee may appoint two successor trustees. The appointment of new trustees and their acceptance shall be in writing.

In Witness Whereof the parties hereto have executed this agreement the day and year first above written.

Executed in tripulicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer
KENNET G. SMITH (Seal)
DOUGLAS SMITH (Seal)
As Trustees.

Attest:
JAMES A. HENNING
(Seal) *Secretary.*

a

79 MODIFICATION OF JUNE TRUST

November 4th 1922

This Instrument, executed this 4th day of November 1922 by Douglas Smith of Chicago (hereinafter sometimes called the Grantor) and Foreman Bros. Banking Co. of Chicago, as Trustee,

Witnesseth That:

Whereas, by instrument dated September 25, 1922, the Grantor established a trust for the benefit of his daughter, June Keith Slater, known as the June Trust, under which Foreman Bros. Banking Co. of Chicago is one of the Trustees. Said trust agreement contains the following provision which appears as paragraph six thereof:

"Anything herein contained to the contrary notwithstanding, this trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors."

Pursuant to the above power and in accordance therewith said June Trust agreement is hereby modified in the following particular:

By striking out paragraph 11 thereof.

Executed in triplicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer
As Trustee under the June Trust.

80 EXHIBIT "C"

Florence Trust

This Agreement, made this 25th day of September 1922 between Douglas Smith of Chicago (hereinafter sometimes called the Grantor), and Foreman Bros. Banking Co. of Chicago, Douglas Smith and Kenneth G. Smith of Chicago, as Trustees,

Witnesseth That:

It is the desire and intent of the Grantor to settle, assign, transfer and deliver certain securities of which he is now the owner and which are hereafter described, for the uses and purposes and upon the conditions hereafter set forth:

Now Therefore the said Grantor for and in consideration of love and affection and other good and valuable considerations and in consideration of the execution and performance of the Trust hereinafter declared, has assigned, transferred and delivered, and by these presents does assign, transfer and deliver unto Foreman Bros. Banking Co., Douglas Smith and Kenneth G. Smith as Trustees, and to their successors and assigns in said Trust, the following securities, to-wit:

Thirty (3) shares of the common capital stock of the Pepsodent Company, a corporation of Illinois.

Said thirty shares of stock together with all income therefrom and all cash, securities or other property that may hereafter be added thereto are to be held by said Trustees in a trust known as the Florence Trust for and upon the following uses, purposes and conditions:

1. Said Trustees are directed to collect the income and invest and reinvest the same from time to time until the
81 value thereof together with all accumulations and additions thereto amounts, in the opinion of a majority of the Trustees, to the sum of Three Hundred Thousand Dollars ($300,000.00).

2. When the property so accumulated in the Florence Trust has reached said amount of Three Hundred Thousand Dollars ($300,000.00) the net income therefrom, from that time forward, shall be paid in equal monthly installments to or for the account of Florence Gifford Ellis, the daughter of the Grantor, during her life.

3. Upon the death of said Florence Gifford Ellis accu-

mulation shall cease and the principal of this Trust shall go as said beneficiary may by last will in writing appoint, and failing appointment, shall be disposed of by said Trustee as follows:

a. If said Florence Gifford Ellis dies leaving issue, the principal of said Florence Trust shall become the property of such issue in equal shares, the income therefrom to be paid in equal parts to said issue until they respectively reach the age of twenty-one (21) years and as and when they respectively reach said age that part of the principal from which said issue have been so receiving income shall be delivered over to them respectively as their absolute property.

b. If she dies leaving no issue, the principal of the Trust shall go to increase equally two trusts created by instruments of even date herewith for the benefit of her brother and sister, one being known as the June Trust and the other as the Kenneth Trust.

4. All stock certificates, bonds and other securities and all evidence of title of trust property shall be deposited and remain with said Trustee, the Foreman Bros. Banking Co.

5. Said Trustees shall hold, manage and control the said Trust Estate and shall have full power to sell, assign, pledge, mortgage, transfer and deliver any or all of the properties and securities held by him as Trustees at such prices and upon such terms as in their discretion they may deem for
82 the best interests of the Estate. They are given full power and authority to invest and reinvest in such securities and in such manner as in their judgment is wise. Said Trustees are given as wide a latitude in the making of investments and as full power over the assets committed to their charge as if they were in fact the sole legal and equitable owners thereof. Save with the written approval of Douglas Smith, however, no sale shall be made of said Pepsodent stock by said Trustees for a period of fifteen years from the date of this instrument. In the event of Douglas Smith's death no such sale shall be made for five years thereafter without the written approval of Kenneth Smith.

6. Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith, and either one of the other two trustees or their successors.

7. Said Trustees shall collect the income, and after paying all necessary expenses, including a reasonable compensation to the Trustees and reimbursement of all expenses in-

curred in the administration of the Trust, including counsel fees when necessary, shall make disbursement in the manner hereinabove directed.

8. Payments shall be made only upon the personal receipt of the beneficiaries or their guardians. Any adult beneficiary of sound mind, however, may in writing appoint an agent to receive income which has become due. Such appointment shall not be valid for more than one year. No beneficiary shall have any right or authority to assign or anticipate any income or allowance or any disbursement of any part of the principal which he might be entitled to receive, under any of the provisions of said Trust, and no interest of the beneficiaries either in principal or income shall be alienable in any manner or to any extent for the obligations or liabilities, voluntary or involuntary, of such bene-
83 ficiaries or for any claims against them or any of them of whatsoever character.

9. If and when the Trustees are required to make any division or distribution said Trustees are authorized to make such division or distribution of any securities, property or cash as they may see fit, and for that purpose the value which said Trustees may place on the respective securities and properties shall be final and binding.

10. It shall not be the duty of the purchaser of any trust property to see to the application of the purchase money paid therefor nor shall any one who may deal with said Trustees be privileged or required to inquire into the necessity or expediency of any act of said Trustees or of the provisions of this instrument.

11. All taxes of whatsoever nature which are legally imposed upon or assessed against this trust or the income thereof, or against any beneficiary on account of said trust or the receipt of income therefrom, shall in each case be paid by the Trustees out of the income of this trust.

12. The Trustees shall have full power and authority to vote in any manner by them or a majority of them deemed proper any stock held as Trustees or in their discretion may vote such stock by proxy and are hereby duly authorized to execute and deliver any proxies for stock of any corporation held in trust hereunder. In voting such stock the Trustees shall have full discretion and power as though they were the holders of the same in their own right.

13. The Trustees shall have full power and authority to avail themselves in their discretion of any bond or stock subscription privileges which may at any time accrue to
84 them as the holders or owners of any securities of any corporation.

14. The Trustees in their discretion are hereby authorized to unite with other owners of property or securities similar to and held by them in trust hereunder in carrying out any plan for reorganization of any corporation or company whose securities form part of any of the trust estate; to exchange the securities of any corporation for others issued by the same or by any other corporation upon such terms as the Trustees shall deem proper; to assent to the consolidation or merger of any corporation whose securities are held by them with any other corporation; to the lease by such corporation of its property or any portion thereof to any other corporation, or to the lease by any other corporation of its property to such corporation; and upon any such consolidation, merger, lease or similar arrangement to exchange the securities held hereunder for other securities, pursuant to such arrangemnt and to pay all such assessments, expenses, and sums of money as they may deem expedient for the protection of the interests of the Trust estate in stocks, bonds, or other securities and generally to exercise with respect to all securities held by them all the same rights and powers as may be lawfully exercised by individual persons owning similar property in their own right.

15. The Trustees shall have the power to determine according to their own judgment what is and what is not net income from this trust, and what is and what is not principal, and their decision in that respect shall be final and binding.

16. In case of the refusal or inability of any trustee to perform any duty under the Trusts hereby provided, the Trusteeship shall thereby be vacated as to such trustee and in such case or in case of the death or resignation of any
85 trustee the remaining trustees shall have authority, and it shall be their duty to appoint another trustee to fill the vacancy so caused so that at all times there may be three competent trustees. One of said Trustees, however, must always be a bank or trust company of the city of Chicago. If two vacancies occur at the same time, the surviving trustee may appoint two successor trustees. The appointment of new trustees and their acceptance shall be in writing.

In Witness Whereof the parties hereto have executed this agreement the day and year first above written.
Executed in triplicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer
KENNETH G. SMITH (Seal)
DOUGLAS SMITH (Seal)
As Trustees.

Attest:
JAMES A. HENNING
(Seal) *Secretary.*

86 MODIFICATION OF FLORENCE TRUST

November 4th, 1922

This Instrument, executed this 4th day of November 1922 by Douglas Smith of Chicago (hereinafter sometimes called the Grantor) and Foreman Bros. Banking Co. of Chicago, as Trustee,

Witnesseth That:

Whereas, by instrument dated September 25, 1922, the Grantor established a trust for the benefit of his daughter, Florence Gifford Ellis, known as the Florence Trust, under which Foreman Bros. Banking Co. of Chicago is one of the Trustees. Said trust agreement contains the following provision which appears as paragraph six thereof:

"Anything herein contained to the contrary notwithstanding, this trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors."

Pursuant to the above power and in accordance therewith said Florence Trust agreement is hereby modified in the following particular:

By striking out paragraph 11 thereof.
Executed in triplicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer
As Trustee under the Florence Trust.

87 EXHIBIT "D."

Kenneth Trust.

This Agreement, made this 25th day of September, 1922, between Douglas Smith of Chicago (hereinafter sometimes called the Grantor), and Foreman Bros. Banking Co. of Chicago, Douglas Smith and Kenneth G. Smith of Chicago, as Trustees,

Witnesseth That:

It is the desire and intent of the Grantor to settle, assign, transfer and deliver certain securities of which he is now the owner, and which are hereafter described, for the uses and purposes and upon the conditions hereinafter set forth:

Now Therefore the said Grantor for and in consideration of love and affection and other good and valuable considerations and in consideration of the execution and performance of the Trusts hereinafter declared, has assigned, transferred and delivered, and by these presents does assign, transfer and deliver unto Foreman Bros. Banking Co., Douglas Smith and Kenneth G. Smith, as Trustees, and to their successors and assigns in said Trust, the following securities, to-wit:

One Hundred (100) shares of the common capital stock of the Pepsodent Company, a corporation of Illinois.

Said 100 shares of stock together with all income therefrom and all cash, securities or other property that may hereafter be added thereto are to be held by said Trustees in a trust to be known as the Kenneth Trust for and upon the following uses, purposes and conditions:

1. The net income from said Kenneth Trust shall be paid to said Kenneth C. Smith in monthly installments until he attains the age of forty (40) years, at which time the principal of said Trust shall be delivered to him as his absolute property.

2. If said Kenneth G. Smith dies before reaching the
88 age of forty years, the principal of said Kenneth Trust shall be paid over and delivered in such manner as said Kenneth G. Smith shall by his last will in writing appoint, and failing such appointment, shall be disposed of by said Trustees as follows:

a. If he dies leaving issue and a widow, one-third of said principal shall become absolutely the property of such widow, the remaining two-thirds of said principal shall become the

property of the issue of said Kenneth G. Smith in equal shares; the income therefrom to be paid in equal parts to said issue until they respectively reach the age of twenty-one (21) years. As and when such issue respectively reach the age of twenty-one years that part of the principal from which said issue have been so receiving income shall be paid over to them, respectively, as their absolute property.

b. If he dies leaving issue but no widow the provision for the disposition of two-thirds of said principal in the preceding paragraph shall govern the disposition of the entire principal.

c. If he dies without issue but leaving a widow, one-half of the principal shall become absolutely the property of said widow and the remaining half shall go to increase equally two trusts created by instruments of even date herewith for the benefit of the daughters of the Grantor, one being known as the Florence Trust and the other as the June Trust.

d. If he dies without issue and leaving no widow the entire principal shall go to increase equally the Florence Trust and the June Trust.

3. All stock certificates, bonds and other securities and all evidences of title of trust property shall be deposited and remain with said Trustee, the Foreman Bros. Banking Co.

4. Said Trustees shall hold, manage and control the said Trust Estate and shall have full power to sell, assign, pledge, mortgage, transfer and deliver any or all of the properties and securities held by them as Trustees at such prices and upon such terms as in their discretion they may deem for the best interests of the Estate. They are given full power and authority to invest and reinvest in such securities and in such manner as in their judgment is wise. Said Trustees are given as wide a latitude in the making of investment and as full
89 power over the assets committed to their charge as if they were in fact the sole legal and equitable owners thereof. Save with the written approval of Douglas Smith, however, no sale shall be made of said Pepsodent stock by said Trustees for a period of fifteen years from the date of this instrument. In the event of Douglas Smith's death no such sale shall be made for five years thereafter without the written approval of Kenneth G. Smith.

5. Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith, and either one of the other two trustees or their successors.

6. Said Trustees shall collect the income, and after paying all necessary expenses, including a reasonable compensation to the Trustees and reimbursement of all expenses incurred in the administration of the Trust, including counsel fees when necessary, shall make disbursement in the manner hereinabove directed.

7. Payments shall be made only upon the personal receipt of the beneficiaries or their guardians. Any adult beneficiary of sound mind, however, may in writing appoint an agent to receive income which has become due. Such appointment shall not be valid for more than one year. No beneficiary shall have any right or authority to assign or anticipate any income or allowance of any disbursement of any part of the principal which he might be entitled to receive, under any of the provisions of said Trust, and no interest of the beneficiaries either in principal or income shall be alienable in any manner or to any extent for the obligations or liabilities, voluntary or involuntary, of such beneficiaries or for any claims against them or any of them of whatsoever character.

8. If and when the Trustees are required to make any division or distribution said Trustees are authorized to make such division or distribution of any securities, property or
90 cash as they may see fit, and for that purpose the value which said Trustees may place on the respective securities and properties shall be final and binding.

9. It shall not be the duty of the purchaser of any trust property to see to the application of the purchase money paid therefor nor shall any one who may deal with said Trustees be privileged or required to inquire into the necessity or expediency of any act of said Trustees or of the provisions of this instrument.

10. All taxes of whatsoever nature which are legally imposed upon or assessed against this trust or the income thereof or against any beneficiary on account of said trust or the receipt of income therefrom, shall in each case be paid by the Trustees out of the income of this trust.

11. The Trustees shall have full power and authority to vote in any manner by them or a majority of them deemed proper any stock held as Trustees or in their discretion may vote such stock by proxy and are hereby duly authorized to execute and deliver any proxies for stock of any corporation held in trust hereunder. In voting such stock the Trustees shall have full discretioi and power as though they were the holders of the same in their own right.

12. The Trustees shall have full power and authority to avail themselves in their discretion of any bond or stock subscription privileges which may at any time accrue to them as the holders or owners of any securities of any corporation.

13. The Trustees in their discretion are hereby authorized to unite with other owners of property or securities similar to any held by them in trust hereunder in carrying out any plan for reorganization of any corporation or company whose securities form part of any of the trust estate; to exchange the securities of any corporation for others issued by the
91 same or by any other corporation upon such terms as the Trustees shall deem proper; to assent to the consolidation or merger of any corporation whose securities are held by them with any other corporation; to the lease by such corporation of its property or any portion thereof to any other corporation, or to the lease by any other corporation of its property to such corporation; and upon any such consolidation, merger, lease or similar arrangement, to exchange the securities held hereunder for other securities, pursuant to such arrangement; and to pay all such assessments, expenses, and sums of money as they may deem expedient for the protection of the interests of the Trust estate in stocks, bonds, or other securities, and generally to exercise with respect to all securities held by them all the same rights and powers as may be lawfully exercised by individual persons owning similar property in their own right.

14. The Trustee shall have the power to determine according to their own judgment what is and what is not net income from this trust, and what is and what is not principal, and their decision in that respect shall be final and binding.

15. In case of the refusal or inability of any trustee to perform any duty under the Trusts hereby provided, the Trusteeship shall thereby be vacated as to such trustee and in such case or in case of the death or resignation of any trustee the remaining trustees shall have authority, and it shall be their duty, to appoint another trustee to fill the vacancy so caused so that at all times there may be three competent trustees. One of said trustees, however, must always be a bank or trust company of the City of Chicago. If two vacancies occur at the same time, the surviving trustee may appoint two successor trustees. The appointment of new trustees and their acceptance shall be in writing.

92 In Witness Whereof the parties hereto have executed this agreement the date and year first above written. Executed in triplicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer
KENNETH G. SMITH (Seal)
DOUGLAS SMITH (Seal)
As Trustees.

Attest:
JAMES A. HENNING,
(Seal) *Secretary.*

93 MODIFICATION OF KENNETH TRUST.

November 4th, 1922.

This Instrument executed this 4th day of November 1922 by Douglas Smith of Chicago (hereinafter sometimes called the Grantor) and Foreman Bros. Banking Co. of Chicago, as Trustee, Witnesseth That:

Whereas, by instrument dated September 25, 1922, the Grantor established a trust for the benefit of his son, Kenneth G. Smith, known as the Kenneth Trust, under which Foreman Bros. Banking Co. of Chicago is one of the Trustees. Said trust agreement contains the following provision which appears as paragraph 5 thereof:

"Anything herein contained to the contrary notwithstanding, this trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors."

Pursuant to the above power and in accordance therewith said Kenneth Trust agreement is hereby modified in the following particulars:

By striking out paragraph 10 thereof.

Executed in triplicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer
As Trustees under the Kenneth Trust.

94 EXHIBIT "E."

General Trust.

This Agreement made this 30th day of October, 1922, between Douglas Smith of Chicago (hereinafter sometimes called Grantor) and Foreman Bros. Banking Co. of Chicago, Douglas Smith and Kenneth G. Smith of Chicago as Trustees,

Witnesseth That:

Whereas, by instruments dated September 25, 1922, the Grantor established three trusts, one, the Emaroy Trust, for the benefit of his wife; another, the June Trust, for the benefit of his daughter, June Keith Slater; and another, the Florence Trust, for the benefit of his daughter, Florence Gifford Ellis; and it is his intention that the principal of said trusts be increased and the income thereof accumulated until certain principal amounts therein named have been reached, the income from which will in Grantor's opinion be adequate for the purposes he has in mind;

And Whereas, it is the desire and intent of the Grantor that until said trusts respectively reach the amount so contemplated for them, his wife and daughters shall receive definite incomes and especially that his wife may be enabled to live in a manner in keeping with the present circumstances of the Grantor;

And Whereas, a trust known as the Kenneth Trust has been established for the benefit of Grantor's son, Kenneth G. Smith;

Now, Therefore, the said Grantor for and in consideration of love and affection and other good and valuable considerations, has assigned, transferred and delivered, and by these presents does assign, transfer and deliver unto Foreman
95 Bros. Banking Co., Douglas Smith and Kenneth G. Smith, as Trustees, and to their successors and assigns in this Trust, the following securities, to wit:

Five Hundred Thirty-nine (539) shares of the common capital stock of the Pepsodent Company, a corporation of Illinois. Said 539 shares of stock together with all income therefrom and any cash, securities or any other property that may hereafter be added thereto are to be held by said Trustees in a trust to be known as the General Trust for and upon the following uses, purposes and conditions:

1. From the net income of said Trust there shall be paid:

a. To or for the account of Emaroy J. Smith, the wife of the Grantor, Three Thousand Dollars ($3,000) in each month during her life or until the establishment of the full principal of the Emaroy Trust.

b. To or for the account of June Keith Slater, daughter of the Grantor, Nine Hundred Dollars ($900) in each month during her life or until the establishment of the full principal of the June Trust.

c. To or for the account of Florence Gifford Ellis, daughter of the Grantor, Nine Hundred Dollars ($900) in each month during her life or until the establishment of the full principal of the Florence Trust.

Should the net income of this trust be insufficient to make the foregoing payments, the Trustees are directed to abate said payments proportionately.

2. The balance of the net income from said General Trust shall be paid over in quarterly installments as follows:

5/11s thereof to Foreman Bros. Banking Co., Douglas Smith and Kenneth G. Smith, as trustees of the Emaroy Trust;

3/11s thereof to them as Trustees of the June Trust;

3/11s thereof to them as Trustees of the Florence Trust.

96 Such payments are to continue until the property held by said Trustees together with its accumulations and additions, amounts in value in the opinion of the majority of said Trustees, in the case of the Emaroy Trust to Five Hundred Thousand Dollars ($500,000) and in the case of the June and Florence Trust to Three Hundred Thousand Dollars ($300,000) each.

Provided, however, that in the event of the death of Grantor's said wife or in the event of the death of either of said daughters, with or without children, prior to the completion of the Trust so established for her benefit, no further payments shall be made to the Trust created for the benefit of the person so dying; and the share of the income which would otherwise have gone to the Trust established for the benefit of the persons so dying shall (subject to the provision hereinafter made) be apportioned between the Trusts created for the benefit of the survivors of said three beneficiaries in accordance with the proportions hereinabove set forth. For example, if the survivors are the wife and one daughter, the apportionment will be five parts to the Emaroy Trust and three parts to the Trust for the daughter; if the two daughters are the survivors the apportionment will be in equal parts between their respective trusts.

3. In the event of the death of either of said daughters prior to the establishment of the full principal of the said trust created for her benefit, leaving Children her surviving, the trustees shall set aside a portion of the principal of this General Trust in value sufficient in the opinion of the majority of said trustees, together with the value of the principal of the trust for the benefit of the daughter so dying as it stood at the time of her death, to make up a total of $300,000.
97 The portion so set aside is hereinafter referred to as the Supplemental Fund. The income from such Supplemental Fund shall be paid in equal shares to or for the benefit of the children of the daughter so dying, during their lives or until they respectively attain the age of twenty-one years. As and when said children respectively attain the age of twenty-one years that part of the principal of said Supplemental Fund from which said children have been so receiving income shall be delivered over to them respectively as their absolute property. For example, if the children of a daughter so dying were three in number, each would receive one-third of the income from such Supplemental Fund during his life or until he reached the age of twenty-one years and at the time of reaching that age would receive one-third of the principal of such Supplemental Fund. If any of said children so receiving income from such Supplemental Fund should die before attaining the age of twenty-one years, the share of the income which would otherwise have gone to the child so dying shall be apportioned equally between his surviving brothers and sisters. Should all of said children die before attaining the age of twenty-one years, the entire Supplemental Fund shall be disposed of in like manner as the principal of this General Trust is disposed of under paragraph 4 hereof.

4. Upon the establishment of the full principal of the Emaroy, June and Florence Trusts—or if payments to any of said Trusts have terminated as above provided, then upon establishment of the full principal of the Trusts for the survivors of said three beneficiaries—the Trustees, retaining only the Supplemental Fund or Funds (if any have been set aside in accordance with the provisions of Paragraph 3 hereof) shall deliver the principal of this General Trust to the Kenneth Trust. If at such time Kenneth G. Smith has attained
98 forty (40) years of age, they shall make delivery to him personally. If he be not then living, the principal of this Trust, subject only to the reservation, if any, for Supplemental Funds, shall be disposed of in like manner and subject to

the same power of appointment as has been provided for the principal of said Kenneth Trust.

5. All stock certificates, bonds and other securities and all evidences of title of trust property shall be deposited and remain with said Trustee, the Foreman Bros. Banking Co.

6. Said Trustees shall hold, manage and control the said Trust Estate and shall have full power to sell, assign, pledge, mortgage, transfer and deliver any or all of the properties and securities held by them as Trustees at such prices and upon such terms as in their discretion they may deem for the best interests of the Estate. They are given full power and authority to invest and reinvest in such securities and in such manner as in their judgment is wise. Said Trustees are given as wide a latitude in the making of investment and as full power over the assets committed to their charge as if they were in fact the sole legal and equitable owners thereof. Save with the written approval of Douglas Smith, however, no sale shall be made of said Pepsodent stock by said Trustees for a period of fifteen years from the date of this Instrument. In the event of Douglas Smith's death no such sale shall be made for five years thereafter without the written approval of Kenneth G. Smith.

7. Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith, and either one of the other two trustees or their successors.

8. Said Trustees shall collect the income, and after paying all necessary expenses, including a reasonable com-
99 pensation to the Trustees and reimbursement of all expenses incurred in the administration of the Trust, including counsel fees when necessary, shall make disbursements in the manner hereinabove directed.

9. Payments shall be made only upon the personal receipt of the beneficiaries or their guardians. Any adult beneficiary of sound mind, however, may in writing appoint an agent to receive income which has become due. Such appointment shall not be valid for more than one year. No beneficiary shall have any right or authority to assign or anticipate any income or allowance of any disbursement of any part of the principal which he might be entitled to receive, under any of the provisions of said Trust, and no interest of the beneficiaries either in principal or income shall be alienable in any manner or to any extent for the obligations or liabilities, vol-

untary or involuntary, of such beneficiaries or for any claims against them or any of them of whatsoever character.

10. If and when the Trustes are required to make any division or distribution said Trustees are authorized to make such division or distribution of any securities, property or cash as they may see fit, and for that purpose the value which said Trustees may place on the respective securities and properties shall be final and binding.

11. It shall not be the duty of the purchaser of any trust property to see to the application of the purchase money paid therefor nor shall any one who may deal with said Trustees be privileged or required to inquire into the necessity or expediency of any act of said Trustees or of the provisions of this instrument.

12. The Trustees shall have full power and authority to vote in any manner by them or a majority of them deemed
100 proper any stock held as Trustees or in their discretion may vote such stock by proxy and are hereby duly authorized to execute and deliver any proxies for stock of any corporation held in trust hereunder. In voting such stock the Trustees shall have full discretion and power as though they were the holders of the same in their own right.

13. The Trustees shall have full power and authority to avail themselves in their discretion of any bond or stock subscription privileges which may at any time accrue to them as the holders or owners of any securities of any corporation.

14. The Trustees in their discretion are hereby authorized to unite with other owners of property or securities similar to any held by them in trust hereunder in carrying out any plan for reorganization of any corporation or company whose securities form part of any of the Trust Estate; to exchange the securities of any corporation for others issued by the same or by any other corporation upon such terms as the Trustees shall deem proper; to assent to the consolidation or merger of any corporation whose securities are held by them with any other corporation; to the lease by such corporation of its property or any portion thereof to any other corporation, or to the lease by any other corporation of its property to such corporation; and upon any such consolidation, merger, lease or similar arrangement to exchange the securities held hereunder for other securities, pursuant to such arrangement; and to pay all such assessments, expenses, and sums of money as they may deem expedient for the protection of the interests of the Trust Estate in stocks, bonds or other securities, and gen-

erally to exercise with respect to all securities held by them all the same rights and powers as may be lawfully exer-
101 cised by individual persons owning similar property in their own right.

15. The Trustees shall have the power to determine according to their own judgment what is and what is not net income from this Trust, and what is and what is not principal, and their decision in that respect shall be final and binding.

16. In case of the refusal or inability of any Trustee to perform any duty under the Trusts hereby provided, the Trusteeship shall thereby be vacated as to such trustee and in such case or in the case of the death or resignation of any trustee the remaining trustees shall have authority, and it shall be their duty, to appoint another trustee to fill the vacancy so caused so that at all times there may be three competent trustees. One of said Trustees, however, must always be a bank or trust company of the City of Chicago. If two vacancies occur at the same time, the surviving trustee may appoint two successor trustees. The appointment of new trustees and their acceptance shall be in writing.

In Witness Whereof the parties hereto have executed this agreement the day and year first above written.

Executed in triplicate.

DOUGLAS SMITH (Seal)
FOREMAN BROS. BANKING CO.
By NEIL J. SHANNON
Its Trust Officer

Attest:
JAMES A. HEMINGWAY.

DOUGLAS SMITH (Seal)
KENNETH G. SMITH (Seal)
As Trustees.

102 And on to wit the 9th day of October, 1930 being one of the days of the regular October Term of said Court in the record of proceedings thereof in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry to wit:

103 * * (Caption) * *

Thursday, October 9, 1930.

Present Honorable George A. Carpenter, Judge of said Court.

On stipulation of the parties to this suit filed herein It Is Ordered that the time within which the defendant is to file her plea, answer or demurrer be and the same is hereby extended to and including November 9, A. D. 1930.

104 And on to wit the 10th day of November, 1931 came the Defendant by her attorney and filed in the Clerk's Office of said Court a certain Plea in words and figures following to wit:

105 * * (Caption) * *

PLEA.

And now comes the defendant, Mabel G. Reinecke, by George E. Q. Johnson, United States Attorney for the Northern District of Illinois, her attorney, and as to the said declaration and each count thereof defends the wrong and injury, when, etc., and says that she did not promise in manner and form as the plaintiff has above thereof complained against her; and of this she puts herself upon the country, etc.

GEORGE E. Q. JOHNSON,
United States Attorney.

106 And on to wit the 28th day of November, 1930 came the parties to this suit by their attorneys and filed in the Clerk's Office of said Court a certain Stipulation in words and figures following to wit:

107 * * (Caption) * *

STIPULATION.

It is hereby stipulated and agreed by and between the parties, by their respective attorneys, that the plea heretofore filed by the defendant may be withdrawn and a demurrer filed in lieu thereof.

HOPKINS, STARR & HOPKINS
BURRY, JOHNSTONE, PETERS & DIXON
Attorneys for Plaintiff.
GEORGE E. Q. JOHNSON
United States Attorney for the Northern District of Illinois, Attorney for Defendant.

108 And on to wit the 28th day of November, 1930 being one of the days of the regular November Term of said Court in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry to wit:

109 * * (Caption) * *

Friday, November 28, 1930.

Present: Honorable George A. Carpenter, Judge of said Court.

On stipulation of the parties to this suit filed herein It Is Ordered that leave be and the same is hereby given the Defendant to withdraw her plea filed in said cause and leave be and the same is hereby given the Defendant to file Demurrer in the above entitled cause.

110 And on to with the 28th day of November, 1930 came the Defendant by her attorney and filed in the Clerk's Office of said Court a certain Demurrer in words and figures following, to wit:

111 * * (Caption) * *

DEMURRER.

And the defendant by George E. Q. Johnson, United States Attorney for the Northern District of Illinois, her attorney, comes and defends, et cetera, when, et cetera, and says that the said declaration and each count thereof and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiffs to maintain their aforesaid action and that she, the defendant, is not bound by law to answer the same; and this she is ready to verify; Wherefore for want of a sufficient declaration in this behalf, the defendant prays judgment, and that the plaintiffs may be barred from maintaining their aforesaid action, et cetera.

GEORGE E. Q. JOHNSON
United States Attorney for the Northern District of Illinois.

112 And on to wit the 22nd day of June, 1931 being one of the days of the regular June Term of said Court in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry to wit:

113 * * (Caption) * *

Monday, June 22, 1931.

Present: Honorable George A. Carpenter, Judge of said Court.

This cause coming on to be heard upon the defendant's demurrer to the plaintiff's declaration filed in said cause and after arguments of counsel and due deliberation by the court said demurrer is overruled and thirty (30) days time from this date is allowed the defendant within which to elect to plead or stand by her demurrer.

114 And on to wit the 28th day of July, 1931 being one of the days of the regular July Term of said Court in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry to wit:

115 * * (Caption) * *

ORDER.

This matter coming on before the court for further proceedings, the plaintiffs being represented by Hopkins, Sutter, Halls & DeWolfe and Burry, Johnstone, Peters and Dixon of Chicago, Illinois, and the defendant by George E. Q. Johnson, United States Attorney for the Northern District of Illinois, and the court having heretofore, on June 22, A. D. 1931, overruled the defendant's demurrer as to each and every count of the plaintiffs' declaration and having given the defendant thirty (30) days from said date in which to elect whether to plead over or stand on her said demurrer, and the defendant, by her attorney, having this day in open court elected to stand on her said demurrer and having refused to plead over, and the plaintiffs being now entitled to have judgment entered for them and against the defendant;

Now, Therefore, It Is Ordered, Adjudged and Decreed that the plaintiffs do recover of the defendant the sum of Fifty-
116 nine Thousand Eight Hundred Ninety-six Dollars Fifty-one Cents ($59,896.51), together with interest thereon at the rate of six per centum (6%) per annum, upon Thirty Thousand Three Hundred Thirteen Dollars Ninety-nine Cents ($30,313.99) thereof from December 15, 1925, and upon the balance thereof, in the sum of Twenty-nine Thousand Five Hundred Eighty-two Dollars Fifty-two Cents ($29,582.52), from September 15, 1925, to a date preceding the date of the refund check to be issued in payment of this judgment by not more than thirty (30) days, such date to be determined by the Commissioner of Internal Revenue, all as provided by law.

Enter:

JOHN P. BARNES
Judge.

Dated this 28th day of July, A. D. 1931.

117 And on to wit the 28th day of July, 1931 being one of the days of the regular July Term of said Court in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry to wit:

118 * * (Caption) * *

CERTIFICATE OF PROBABLE CAUSE.

It is hereby certified that the Collector of Internal Revenue for the First District of Illinois, defendant herein, had probable cause for making the assessment and levying the tax upon which the findings and judgment herein are based.

JOHN P. BARNES
Judge.

Dated July 28th, A. D. 1931.

119 And on to wit the 23rd day of October, 1931 came the defendant by her attorney and filed in the Clerk's Office of said Court a certain Notice in words and figures following to wit:

120 * * (Caption) * *

To: Hopkins, Starr & Hopkins,
110 So. Dearborn St.,
Burry, Johnstone, Peters & Dixon,
105 So. La Salle St.,
Chicago, Illinois.
Attorneys for Plaintiffs.

NOTICE.

You and each of you are hereby notified that on Friday, October 23, 1931, at the opening of court in the forenoon, or as soon thereafter as counsel can be heard, I shall appear before his Honor, Judge Charles E. Woodward, in the room regularly occupied by him as a court room in the Federal Building at Chicago, Illinois, and ask leave of court to file the petition of Mabel G. Reinecke, defendant, for an appeal, together with an assignment of errors, and shall enter the

motion of the defendant, Mabel G. Reinecke, formerly Collector of Internal Revenue for the First Collection District of Illinois, for the issuance and allowance of an appeal directed to the United States Circuit Court of Appeals for the Seventh Circuit, and for the issuance of a citation to
121 the above named plaintiffs in accordance with said appeal, at which time and place you may appear if you so desire.

GEORGE E. Q. JOHNSON
United States Attorney for the Northern District of Illinois.
Attorney for Defendant.

Received a copy of the above and foregoing notice this ..... day of October, A. D. 1931.

BURRY, JOHNSTONE, PETERS & DIXON
HOPKINS, SUTTER, HALLS & DEWOLFE
Attorneys for Plaintiffs.

122 And on to wit the 23rd day of October, 1931 came the defendant by her attorney and filed in the Clerk's Office of said Court a certain Petition for Appeal in words and figures following to wit:

123 * * (Caption) * *

PETITION FOR APPEAL.

Now comes Mabel G. Reinecke, formerly Collector of Internal Revenue for the First Collection District of Illinois, the defendant, by her attorney, George E. Q. Johnson, United States Attorney for the Northern District of Illinois, and respectfully shows that on the 28th day of July, A. D. 1931, the court having overruled the demurrer of the defendant to the declaration of the plaintiffs, entered judgment for the plaintiffs upon said demurrer and against the defendant, your petitioner.

Your petitioner feeling herself aggrieved by said judgment and pursuant to the authority and direction of the Attorney General of the United States herewith petitions the court for an order allowing her to prosecute an appeal to the United States Circuit Court of Appeals for the Seventh Circuit under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioner prays that an appeal in this behalf be allowed to the United States
124 Circuit Court of Appeals for the Seventh Circuit, sitting in Chicago, Illinois, in said Circuit, for the correction of the errors complained of and herein assigned, and that an order be entered allowing said appeal without bond of the defendant, it appearing that this cause is one in which the United States is the real party in interest and that this petition for appeal is filed pursuant to the authority and direction of the Attorney General of the United States.

GEORGE E. Q. JOHNSON
United States Attorney for the Northern District of Illinois.
Attorney for Defendant.

Dated at Chicago, Illinois, this 23rd day of October, A. D. 1931.

125 And on to wit the 23rd day of October, 1931 came the defendant by her attorney and filed in the Clerk's Office of said Court a certain Assignment of Errors in words and figures following to wit:

126 * * (Caption) * *

ASSIGNMENT OF ERRORS.

Now comes the defendant, Mabel G. Reinecke, formerly Collector of Internal Revenue for the First Collection District of Illinois, by George E. Q. Johnson, United States Attorney for the Northern District of Illinois, her attorney, and by direction and authority of the Attorney General of the United States is about to file a petition for an appeal from the judgment of this court rendered on the 28th day of July, A. D. 1931, in this cause, and in connection with her petition for appeal says that in the record proceedings and in the final judgment aforesaid manifest error has intervened to the prejudice of the defendant, to wit:

1. Said District Court erred in overruling the demurrer of the defendant to the declaration of the plaintiffs and in entering judgment upon the said demurrer for the plaintiffs.

2. Said District Court erred in refusing to sustain the demurrer of the defendant to the declaration of the plaintiffs.

3. Said District Court erred in holding as a matter of law that the declaration stated a good cause of action and that the plaintiffs upon the face of said declaration were entitled to judgment.

4. Said District Court erred in refusing to hold as a matter of law that the income from the several trusts men-
127 tioned in the several counts of the declaration was legally and constitutionally taxable to the plaintiff's testator, Douglas Smith, under paragraph (g) of Section 219 of the Revenue Act of 1924.

Wherefore, defendant, appellant prays that the judgment of the said District Court be reversed, etc.

GEORGE E. Q. JOHNSON,
United States Attorney for the Northern District of Illinois, Attorney for defendant.

Dated at Chicago, Illinois, this 23rd day of October, A. D. 1931.

128 And on to wit the 23rd day of October 1931 being one of the days of the regular October Term of said Court in the record of proceedings thereof, in said entitled cause, before the Honorable Walter C. Lindley, District Judge, appears the following entry to wit:

129 * * (Caption) * *

ORDER.

This cause coming on to be heard this 23rd day of October, A. D. 1931, on the petition of Mabel G. Reinecke, formerly Collector of Internal Revenue for the First Collection District of Illinois, defendant, and the said defendant appearing by her attorney, George E. Q. Johnson, United States Attorney for the Northern District of Illinois, for an order allowing her to prosecute an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and an assignment of errors accompanying the said petition, and it appearing that notice of this proceeding has been given to the plaintiffs:

It is ordered in open court that the prayer of said petitioner be, and it is hereby, allowed, and the appeal prayed for by said petitioner is hereby granted and allowed without bond of the defendant, it appearing that this cause is one in which the United States is the real party in interest and that this ap-

peal is being taken by the direction and authority of the
130 Attorney General of the United States of America.

Enter:

WALTER C. LINDLEY
Judge of the District Court for the Northern District of Illinois, Eastern Division.

Dated this 23rd day of October, A. D. 1931.

131 And afterwards, to wit, on the 21st day of November 1931, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable James H. Wilkerson, District Judge, appears the following entry, to wit:

132 * * (Caption) * *

Saturday, November 21, 1931.

Present: Honorable James H. Wilkerson, Judge of said Court.

On stipulation of the parties to this suit filed herein
It Is Ordered that the time within which the Defendant is to file Transcript of Record with the Clerk of the Circuit Court of Appeals for the Seventh Circuit and for docketing the cause in the office of said Clerk be and the same is hereby extended to and including November 27, 1931.

133 * * (Caption) * *

PRAECIPE FOR TRANSCRIPT OF RECORD.

To: Charles M. Bates, Esq., Clerk of the District Court of the United States, for the Northern District of Illinois, Eastern Division.

You will please prepare a transcript of the record in the above entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit in the appeal heretofore allowed in said cause, and include in said transcript the following:

1. Placita.
2. Declaration.

3. Order of October 9, 1930, extending, pursuant to stipulation, the time for defendant to plead to and including November 9, 1930.
4. Plea of defendant.
5. Stipulation providing for withdrawal by defendant of plea and filing of a demurrer in lieu thereof.
6. Order of November 28, 1930, giving leave to defendant to withdraw plea and file demurrer.
7. Demurrer.

134 8. Order of June 22, 1931, overruling demurrer of defendant and allowing defendant 30 days to elect to plead over or to stand on demurrer.

9. Judgment order of July 28, 1931.
10. Certificate of probable cause.
11. Notice of petition for appeal.
12. Petition for appeal.
13. Assignment of errors.
14. Order allowing appeal without bond.
15. Citation with acknowledgment of service.
16. Praecipe for transcript of record.
17. Notice of filing praecipe.
18. Clerk's certificate.

Said transcript is to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Seventh Circuit.

GEORGE E. Q. JOHNSON
United States Attorney for the Northern District of Illinois, Eastern Division, Attorney for Defendant.

Endorsed: Filed November 12, 1931. Charles M. Bates, Clerk.

135 Northern District of Illinois } ss:
Eastern Division }

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled Kenneth G. Smith and Foreman-State Trust and Savings

Bank, a banking corporation, Executors of the Will of Douglas Smith, Deceased vs. Mabel G. Reinecke, etc. No. 38956 as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 27th day of November, A. D. 1931.

CHARLES M. BATES,
Clerk.

(Seal)

136 United States of America } ss.

The President of the United States, To Kenneth G. Smith and Foreman-State Trust & Savings Bank, Executors of the Will of Douglas Smith, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to the appeal allowed and filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein Mabel G. Reinecke, formerly Collector of Internal Revenue for the First District of Illinois is appellant and you are appellees to show cause, if any there be, why the judgment rendered against the said Mabel G. Reinecke as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter C. Lindley Judge of the District Court of the United States, for the Northern District of Illinois, this 23rd day of October, in the year of our Lord one thousand nine hundred and thirty-one.

WALTER C. LINDLEY,
Judge.

Service is hereby acknowledged of the above citation this 27 day of October, A. D. 1931.

BURRY, JOHNSTONE, PETERS & DIXON,
HOPKINS, SUTTER, HALLS & DEWOLFE,
Attorneys for Plaintiffs.

(Endorsed) * * (Caption) * * Citation. Filed Oct. 27, 1931. Charles M. Bates, Clerk. George E. Q. Johnson (Green) U. S. Atty.

1 At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States courtroom in the city of Chicago, in said Seventh Circuit, on the sixth day of October, 1931, of the October term in the year of our Lord one thousand nine hundred and thirty-one, and of our independence the one hundred and fifty-sixth.

4692

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR the First District of Illinois, appellant

vs.

KENNETH G. SMITH, AND FOREMAN-STATE TRUST AND SAVINGS BANK, Executors of the Will of Douglas Smith, appellees

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

And afterwards, to wit, on the first of December, 1931, there was filed in the office of the clerk of this court the appearance of counsel for appellant, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 4692. October term, 1931

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE, appellant

vs.

KENNETH G. SMITH AND FOREMAN-STATE TRUST & SAVINGS BANK, Executors of the Will of Douglas Smith, appellees

The clerk will enter appearances as counsel for appellant.

GEORGE E. Q. JOHNSON,
United States Attorney.
JOHN POTTS BARNES,
Special Attorney, Bureau of Internal Revenue.

(Endorsed:) Filed December 1, 1931. Frederick G. Campbell, clerk.

2 And afterwards, to wit, on the second of December, 1931, there was filed in the office of the clerk of this court an appearance for counsel for appellees, which said appearance is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit

No. 4692. October term, 1931

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE, Appellant

vs.

KENNETH G. SMITH AND FOREMAN-STATE TRUST & SAVINGS BANK, Executors of the Will of Douglas Smith, Appellees

The clerk will enter my appearance as counsel for appellees.

BRUCE JOHNSTONE,
105 S. LaSalle St., Chicago, Illinois

(Endorsed): Filed December 2, 1931. Frederick G. Campbell, clerk.

And on the same day, to wit, on the second of December, 1931, there was filed in the office of the clerk of this court an appearance for counsel for appellees, which said appearance is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit

No. 4692. October term, 1931

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE, Appellant

vs.

KENNETH G. SMITH AND FOREMAN-STATE TRUST & SAVINGS BANK, Executors of the Will of Douglas Smith, Appellees

The clerk will enter our appearance as counsel for appellees.

ALBERT L. HOPKINS,
HARRY B. SUTTER,
ANDERSON A. OWEN,
3315 One North LaSalle Street, Chicago.

(Endorsed:) Filed December 2, 1931. Frederick G. Campbell, clerk.

3 And afterwards, to wit, on the twelfth of April, 1932, the following further proceedings were had and entered of record, to wit: Tuseday April 12, 1932, court met pursuant to adjournment and was opened by proclamation of crier.

Present Hon. Samuel Alschuler, circuit judge, presiding; Hon. Evan A. Evans, circuit judge; Hon. William M. Sparks, circuit

judge; Frederick G. Campbell, clerk; Henry C W. Laubenheimer, marshal.

4692

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE, APPELLANT *vs.* KENNETH G. SMITH AND FOREMAN-STATE TRUST & SAVINGS BANK, EXECUTORS OF THE WILL OF DOUGLAS SMITH, APPELLEES	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

It is ordered by the court that this cause be, and the same is hereby set down for hearing on April 29, 1932.

And afterwards, to wit, on the twenty-ninth of April, 1932, the following further proceedings were had and entered of record, to wit: Friday, April 29, 1932, court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Samuel Alschuler, circuit judge, presiding; Hon. Evan A. Evans, circuit judge; Hon. William M. Sparks, circuit judge; Hon. James H. Wilkerson, district judge; Frederick G. Campbell, clery; Henry C. W. Laubenheimer, marshal.

4 Before Hon. SAMUEL ALSCHULER, *Circuit Judge*, *Hon.* WILLIAM M. SPARKS, *Circuit Judge*, Hon. JAMES H. WILKERSON, *District Judge*.

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MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE, APPELLANT *vs.* KENNETH G. SMITH AND FOREMAN-STATE TRUST & SAVINGS BANK, EXECUTORS OF THE WILL OF DOUGLAS SMITH, APPELLEES	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. John Potts Barnes, counsel for appellant, and by Mr. Albert L. Hopkins, counsel for appellee, and the court having heard the same takes this matter under advisement.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States courtroom in the city of Chicago, in said Seventh Circuit, on the fourth day of October, 1932, of the October term in the year of our Lord one thousand nine hundred and thirty-two, and of our independence the one hundred and fifty-seventh.

5 And afterwards, to wit: On the seventh of October, 1932, there was filed in the office of the Clerk of this court the opinion of the court, which said opinion is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 4692. October term and session, 1932

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, Appellant *vs.* KENNETH G. SMITH, AND FOREMAN STATE TRUST & SAVINGS BANK, EXECUTORS OF THE WILL OF DOUGLAS SMITH, Appellees.	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

October 7, 1932

Before ALSCHULER and SPARKS, *Circuit Judges*, and WILKERSON, *District Judge*.

The appeal is from a judgment for the recovery of income taxes paid under protest by Douglas Smith, now deceased. In 1922 Smith created five trusts for the benefit of his wife and children. Each trust agreement named as trustees Foreman Bros. Banking Company, Kenneth Smith, and the grantor. Kenneth Smith was a beneficiary under each trust. Douglas Smith, the grantor, was not a beneficiary under any of the trusts.

Each of the trusts contained a provision that "this trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith and either one of the other two trustees or their successors." The revenue act of 1924, approved June 2, 1924 (section 219 (g)), 43 Stat. 275, 277, contained the following: "(g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the
6 corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

On October 22, 1924, Douglas Smith resigned as trustee and the trust agreements were modified by striking out the provision for the modification or revocation of the trust.

The income of the five trusts for the year 1924 was distributed by the trustees and received by the beneficiaries in accordance with the provisions of the trust agreements. Douglas Smith did not receive any of such income, except as he acted as one of the trustees.

Douglas Smith filed an income tax return for 1924 in which he did not include the income of the five trusts in question. He was required, however, to make an amended return in which such income was included; and, as is admitted by the pleadings, paid involuntarily and under protest and duress $59,898.51 more as taxes for 1924 than he would have paid if the income of the trusts had not been included as a part of his own income.

A claim for refund was rejected by the Commissioner of Internal Revenue. Appellees thereupon brought this suit, which resulted in a judgment for the amount of the claim.

WILKERSON, *District Judge:*

In support of the judgment it is urged:

1. Under a proper construction of section 219 (g) of the revenue act of 1924, the term "beneficiary" is broad enough to include a trustee.

2. As to trusts created both before and after the passage of the act, the section contravenes the fifth amendment unless the term "beneficiary" is construed to cover any interest adverse to that of the grantor.

3. As to trusts created before the passage of the act the section violates the fifth amendment when applied to impose a tax on the grantor by reason of property and its income disposed of by him prior to any imposition of such tax and when no similar tax existed.

As we are of the opinion that the third point must be ruled in favor of the taxpayer in this case, it is not necessary to consider the first two points. In 1922, when the trusts here in question were established, the grantor was not taxable on the income of trusts in which the power of revocation was reserved. The power to
7 revoke the trusts in question could not be exercised by the grantor alone. The consent of the trustee was essential to revocation. The grantor had parted with all interest in and control over the income of the trusts. And, in fact, the income here in question was distributed among the beneficiaries in accordance with the terms of the trusts. To be sure the trustee in October, 1922, assented to a modification of the trusts. We may not conjecture from that, however, that the trustee would have consented to a revocation of the trusts prior to that time, if it had been requested by the grantor to do so.

The power of Congress as to the taxation of the income of trusts which are under the unfettered control of the grantor or which may be created in the future is broad. (*Corliss* v. *Bowers*, 281 U. S. 376; *Milliken et al.* v. *United States*, 283 U. S. 15, 51; *Taft* v. *Bowers*, 278 U. S. 470; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264; *Lambert* v. *Yellowley*, 272 U. S. 581.) All measures reasonably necessary to prevent escape from taxes or surtaxes may be adopted.

When an attempt is made to apply those measures to past lawful transactions by which the grantor has parted with control over the trust fund and has made it impossible to regain such control by his own act, a different question arises. Under the broadest conception of legislative power, that which is not the income of the taxpayer and which it is impossible for him to make a part of his income may not be required arbitrarily to be included in his income. Such an attempt amounts to confiscation and offends the fifth amendment. (*Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Heiner* v. *Donnan*, 285 U. S. 312, 326, 327.)

The judgment is affirmed.

8 And on the same day, to wit, on the seventh of October, 1932 the following further proceedings were had and entered of record, to wit: Friday, October 7, 1932, court met pursuant to adjournment and was opened by proclamation.

Present: Hon. Samuel Alschuler, circuit judge, presiding; Hon. Evan A. Evans, circuit judge; Hon. William M. Sparks, circuit judge; Frederick G. Campbell, clerk; Henry C. W. Laubenheimer, marshal.

Before Hon. SAMUEL ALSCHULER, *Circuit Judge*, Hon. WILLIAM M. SPARKS, *Circuit Judge*, Hon. JAMES H. WILKERSON, *District Judge*

4692

MABEL G. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, APPELLANT *vs.* KENNETH G. SMITH AND FOREMAN STATE TRUST & SAVINGS BANK, EXECUTORS OF THE WILL OF DOUGLAS SMITH, APPELLEES	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed.

9 United States Circuit Court of Appeals for the Seventh Circuit

I, Frederick G. Campbell, clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 8, inclusive, contain a true copy of the proceedings had and papers filed (excepting the briefs of counsel, and motions, stipulations, and

orders relating to the filing of briefs) in the case of Mabel G. Reinecke, formerly Collector of Internal Revenue for the First District of Illinois, appellant, vs. Kenneth G. Smith and Foreman State Trust and Savings Bank, executors of the will of Douglas Smith, appellees, No. 4692, October term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this 4th day of January, A. D. 1933.

[SEAL.] FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals
for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1933

Supreme Court of the United States

Order allowing certiorari

Filed February 13, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.